

In The Matter of:
Ronald M. Lisan, M.D.
VS
Robert Wilke, etc.

Bruce Kafer, RN, MSN

March 08, 2019

Deposition



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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

RONALD M. LISAN, M.D.,

Plaintiff,

JUDGE PATRICIA A. GAUGHAN

-vs-

CASE NO. 1:18-CV-00969

ROBERT WILKE, ACTING SECRETARY
OF THE UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS,

Defendant.

- - - -

Deposition of BRUCE KAHER, RN, MSN, taken as
if upon cross-examination before Pamela S.
Greenfield, a Certified Realtime Reporter,
Registered Diplomate Reporter and Notary Public
within and for the State of Ohio, at the offices
of Sindell & Sindell, LLP, 23611 Chagrin
Boulevard, Suite 227, Beachwood, Ohio, at
9:50 a.m. on Friday, March 8, 2019, pursuant to
notice and/or stipulations of counsel, on behalf
of the Plaintiff in this cause.

- - - -

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ALSO PRESENT:

Ronald Lisan, M.D.

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BRUCE KAFER, RN, MSN, of lawful age, called
by the Plaintiff for the purpose of
cross-examination, as provided by the Rules of
Civil Procedure, being by me first duly sworn, as
hereinafter certified, deposed and said as
follows:

CROSS-EXAMINATION OF BRUCE KAFER, RN, MSN
BY MR. SINDELL:

MR. SINDELL: Let the record show
that this deposition is being taken in the
case of Lisan versus Wilkie.

In addition to the court reporter
and myself, present today here is my
client, Ron Lisan. The witness, Mr. Bruce
Kafer. Lisa Hammond Johnson. Ruchi Asher.
Arlene Shively. My partner, Rachel
Sindell, and we're ready to go.

BY MR. SINDELL:

**Q. As you probably figured out, I'm Steve Sindell.
I represent Ron Lisan in this matter, Mr. Kafer,
and have you ever had your deposition taken
before?**

A. Yes.

**Q. Okay. This may be a little repetitious but you
need to use a full word when you answer a**

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question rather than um-hmm or uh-huh or something like that; and if you forget, I'll remind you.

I don't have to tell you you're under oath. You know that so we, if there's any question I ask you you don't understand, I would appreciate your not answering such a question but ask me to clarify it and I'll be happy to at least try to do so.

If you do answer a question, I'm going to assume that you understood it. Fair enough?

A. Fair enough.

Q. Good.

If you need a break, you know, just let us know. Other than that, it seems to be just a perennial problem with all depositions, and I'm not blaming lawyers or witnesses, we're probably all at fault, but the idea is that the court reporter can only take down one person speaking at a time. Okay?

And therefore, it's important that in my case, you wait until I finish the question even if you almost are certain what the question is going to be because otherwise we're not going to have a record that protects everything. I mean

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1 we want a record that's clear so, and sometimes
2 it's surprising. I might say something in the
3 end of the question that wasn't what you expected
4 so it's good to wait and if you interrupt me
5 without realizing it or whatever, I'll let you
6 know; but it works the same the other way.

7 I should not interrupt your answer and if I
8 do that, please indicate that you haven't
9 completed it yet, you know, and let's try to do
10 that. Okay?

11 That's pretty much it. Do you have any
12 questions other than that about what goes on here
13 or what we're doing?

14 A. No questions.

15 Q. Okay. Very good.

16 Why don't you state your full name for the
17 record, please.

18 A. Bruce Kafer.

19 Q. Spell that.

20 A. B-R-U-C-E. K-A-F-E-R.

21 Q. Do you have a middle name?

22 A. Yes.

23 Q. What is it?

24 A. Lawrence.

25 Q. How do you spell that?

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1 A. L-A-W-R-E-N-C-E.

2 Q. Thank you. You live in the Cleveland area?

3 Cuyahoga County?

4 A. Lorain County.

5 Q. What's your address?

6 A. 35275 Greenwich Avenue, North Ridgeville, Ohio.

7 44039.

8 Q. G-R-E-E-N-W-I-C-H one word?

9 A. Yes.

10 Q. And how long have you lived there?

11 A. Approximately two years.

12 Q. And, sir, are you married?

13 A. Yes.

14 Q. And your wife's name is?

15 A. Annette.

16 Q. Does she work outside the home?

17 A. Not currently.

18 Q. Has she?

19 A. Yes.

20 Q. And what did she do?

21 A. She was a, I forget what the term was where she
22 worked at a hospital called Clear Vista and then
23 prior to that she worked for the county
24 prosecutor's office.

25 Q. Is she an attorney?

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1 A. In Lorain, yes.

2 Q. And what is your birth date?

3 A. February 2nd, 1962, which is Groundhog's Day.

4 Q. Thank you for that.

5 A. You're welcome.

6 Q. So let's do the math. 38 plus 19, right?

7 A. 47 years old.

8 Q. Okay.

9 A. I'm just kidding. I'm actually 57.

10 Q. So I wasn't listening.

11 A. I look younger.

12 Q. Well, I refuse to comment on that. Okay?

13 A. Okay.

14 Q. Because I don't want anybody commenting on how I
15 look.

16 All right. Now, did you grow up in the
17 Cleveland area?

18 A. Yes.

19 Q. And whereabouts?

20 A. Berea, Ohio.

21 Q. Graduated from high school, Berea?

22 A. Yes.

23 Q. What year?

24 A. 1980.

25 Q. And I take it you went to college of course?

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1 A. Correct.

2 **Q. And that was at Case I think? Is that right?**

3 A. I'm currently a student at Case.

4 Prior to that I went to Cuyahoga Community
5 College and Cleveland State University.

6 **Q. Did you obtain a college degree?**

7 A. Yes, I did.

8 **Q. And where was that?**

9 A. All of those schools listed with the exception of
10 Case. I'm working on a degree.

11 **Q. So what degree do you have from college?**

12 A. I have a Master's of Nursing. I have a
13 Bachelor's of Nursing and I have a Associate of
14 Applied Science in mental health technology.

15 **Q. Do you have a nursing license?**

16 A. Yes.

17 **Q. What kind is it, registered?**

18 A. Yeah. It's a registered nurse license in the
19 State of Ohio.

20 **Q. When did you get that?**

21 A. Upon graduation from Cleveland State.

22 **Q. Which was? Approximately?**

23 A. Approximately 1999.

24 **Q. Did you work as a nurse?**

25 A. Yes.

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1 Q. And where would that have been?

2 A. For the Cleveland VA Medical Center.

3 Q. And can you give me the years you worked at the
4 Cleveland VA?

5 A. I began working in 1999 and am currently still
6 employed.

7 Q. As a nurse?

8 A. Correct.

9 Q. So do you take care of patients as a part of your
10 regular job at this time?

11 A. No.

12 Q. How long did you have hands-on care for patients
13 at the VA?

14 A. Until approximately 2009, thereabouts.

15 Q. And then?

16 A. And then I transferred to a different position.

17 Q. Which was?

18 A. Which is the position I'm currently in.

19 Q. Which is?

20 A. A registered nurse position.

21 Q. Do you hold a position as a reasonable
22 accommodation coordinator?

23 A. Yes.

24 Q. And I have some trouble with this. It's not
25 anybody's fault I guess but I don't know what to

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1 call your position. I've seen different labels.
2 Like LRAC and so forth. What is the actual title
3 of your position in that regard at the VA?

4 A. You are correct in that I have a number of
5 titles; so --

6 Q. I didn't know that either.

7 A. -- if you were to view me in a denotative sense
8 from the OPM, Office of Personnel Management,
9 standpoint, I would be an outpatient registered
10 nurse.

11 Q. What about the coordinating position?

12 A. In that role as an outpatient registered nurse, I
13 do reasonable accommodation and I assist our EEO
14 office with various activities.

15 Q. Okay. Mr. Kafer, what I'm actually asking you,
16 though, is a little more technical.

17 The name of your title in that capacity, is
18 there a name for it?

19 A. When I'm working on reasonable accommodation?

20 Q. Yes.

21 A. The name is reasonable accommodation coordinator.

22 Q. That's what I wanted to know.

23 Now let's talk about that position,
24 reasonable accommodation coordinator.

25 When did you begin serving in that capacity

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1 in some way with the VA?

2 A. Approximately 2010? January? Thereabouts.

3 Q. That's fine. Now what percentage of 100 percent
4 of the work you do as of January 2010 would be
5 the reasonable accommodation coordinator
6 position? Just roughly?

7 A. 66 percent.

8 Q. Okay. Two-thirds.

9 All right. Now, have you consistently been
10 spending about two-thirds of your time in the
11 reasonable accommodation coordinator position
12 since January 2010 to the present time or has
13 that changed?

14 A. I don't know.

15 Q. Approximately?

16 A. I would approximate for the past three or four
17 years I would have been spending 66 percent of
18 the time doing reasonable accommodation
19 coordination activities.

20 Q. Okay. I understand that. All right. Now, my
21 sense is just from contact with this case that
22 you also play some kind of role in equal
23 employment opportunity activities?

24 A. Yes.

25 Q. Am I talking about the other third?

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1 A. Yes.

2 Q. So just a guess, tell me if this is correct,
3 equal employment opportunity coordinator, is that
4 another title of yours?

5 A. No.

6 Q. Okay. You do some equal employment opportunity
7 investigations, don't you?

8 A. No.

9 Q. You did in this case?

10 A. No.

11 Q. Okay. You wrote a report that sounds like you
12 were involved in some kind of investigation of a
13 sexual harassment issue?

14 A. That is correct.

15 Q. Okay. In what capacity were you doing that?

16 A. It was a fact finding investigation.

17 Q. Okay. But it was certainly not in the reasonable
18 accommodation area?

19 A. Correct.

20 Q. Okay. So as a fact finding investigation, it was
21 in the, would you agree the equal employment
22 opportunity area?

23 A. Perhaps in the broadest sense.

24 Q. Let me just get to the point. Are you going to
25 take the position here that you made a mistake of

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1 law regarding unwelcome remarks in your report?

2 MS. JOHNSON: Objection. You may
3 answer.

4 A. What?

5 MS. JOHNSON: Do you want to -- I
6 objected. You can go ahead and answer.

7 Q. She can object but you can still answer.

8 MS. JOHNSON: You still answer.
9 Right.

10 So wait. Ask her to read --

11 MR. SINDELL: He looks confused.

12 MS. JOHNSON: I don't think he
13 remembers the question. I've objected.
14 You may answer.

15 A. Okay.

16 MS. JOHNSON: And then if you
17 don't remember the question, the court
18 reporter will read it back for you if you
19 don't remember what the question was. I've
20 objected just to put my objection on the
21 record but when I tell you you can answer,
22 that's, then you can answer. But don't
23 listen to him. Listen to me.

24 A. Okay.

25 Q. No. I happen to agree with that actually.

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1 A. Okay. Would you please repeat the question.

2 Something about did I make a mistake.

3 THE NOTARY: "Are you going to
4 take the position here that you made a
5 mistake of law regarding unwelcome remarks
6 in your report?"

7 A. No, I am not going to take that position.

8 Q. Good. All right. You've defined your role, at
9 least in Dr. Lisan's case, as fact finder, okay?

10 A. Correct.

11 Q. Is there a title for that?

12 A. I don't know.

13 Q. Have you ever been a fact finder before?

14 A. Yes.

15 Q. For what kinds of matters have you been a fact
16 finder?

17 A. In cases where there is a question of whether or
18 not there is some form of harassment or conflict
19 or there is a lack of clarity surrounding events
20 which are alleged.

21 Q. That conflict and lack of clarity could apply to
22 many different kinds of issues. Harassment seems
23 a little more content-wise specific. That's a
24 type of matter. Some kind of harassment, right?
25 I mean conflict could be in anything. Clarity or

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1 lack of clarity could be in any kind of issue; so
2 what I'm interested in is your fact finding
3 capacity limited just to harassment matters?

4 A. No.

5 Q. Okay. Then please tell me what other kinds of
6 matters besides harassment your fact finding is
7 related to.

8 Do you understand my question?

9 A. It sounds like you're asking me the same
10 question.

11 Q. I'm really not trying to ask you the same
12 question but it may be my fault.

13 So I'll try again. Are you a fact finder
14 with reasonable accommodation matters?

15 A. No. I process reasonable accommodation claims.

16 Q. Are you a fact finder with issues involving
17 wages?

18 A. No.

19 Q. Are you a fact finder with issues involving work
20 issues other than harassment?

21 A. Sometimes, yes.

22 Q. That's what I'm asking you. What kinds of things
23 are you fact finding about? Is that a clearer
24 way of putting it?

25 A. Yes.

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1 Q. Okay. Thank you. I'm sorry to have been
2 confusing. I didn't mean to.

3 So what, I want you to just give me examples
4 of the kinds of areas or issues that you do fact
5 finding in.

6 A. If there is conflict within a work group. If
7 there is --

8 Q. What kind of conflict?

9 A. Disagreement or difficulty getting along with one
10 another.

11 Q. Interpersonal relationships at work?

12 A. Yes.

13 Q. Okay. I got that.

14 Anything else?

15 A. Or relationships within teams.

16 Q. Okay. Anything else?

17 A. Questions of or allegations of workplace
18 harassment.

19 Q. And when you say "harassment," what type of
20 harassment?

21 A. Racial.

22 Q. Sexual?

23 A. Yes. And there may be others that I'm not
24 thinking of at the moment.

25 Q. Well, let me at least throw this out as a

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1 suggestion. It sounds like you're talking about
2 discrimination issues of some kind or another.

3 Is that part of what you were talking about?

4 A. Allegations of.

5 Q. Yeah, well, allegations.

6 A. Of discrimination issues or suggestions of
7 discrimination.

8 Q. And does the phrase Title VII mean anything to
9 you?

10 A. Yes.

11 Q. So you know that in Title VII there are different
12 kinds of discriminations that are set forth
13 therein, right?

14 A. Yes.

15 Q. Do you know what they are?

16 A. Offhand not at the moment.

17 Q. Let's see if these ring bells, okay?

18 A. Okay.

19 Q. Race, gender or sex? Does that ring a bell?

20 A. Yes.

21 Q. Religion?

22 A. Is that a question?

23 Q. Yes.

24 A. Yes.

25 Q. Religion question mark.

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1 National origin?

2 A. Yes.

3 Q. That kind of thing. Age?

4 A. Yes.

5 Q. Disability? That's a different statute but
6 disability kinds of issues? Discrimination with
7 respect to?

8 A. Related to disability?

9 Q. Yes.

10 A. Yes.

11 Q. So to do a fact finding investigation in those
12 kinds of areas you would have to -- withdrawn.

13 Do you have any knowledge or training about
14 the laws in those areas?

15 MS. JOHNSON: Objection. You may
16 answer.

17 A. Yes.

18 Q. Okay. Please explain to me what your legal type
19 training is on discrimination or harassment
20 issues.

21 MS. JOHNSON: Again, same
22 objection. You may go ahead.

23 A. I've taken all the VA trainings that we have
24 related to those areas. I've also attended the
25 Employment Law Institute.

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1 Q. What's the Employment Law Institute?

2 A. It's an institute that provides training on those
3 issues.

4 Q. That's for lawyers as well, isn't it?

5 A. Correct.

6 Q. Have you ever attended law school?

7 A. No.

8 Q. Have you had outside of the VA any legal
9 coursework or training of a formal nature?

10 A. Only the legal training that's required for my RN
11 licensure and any coursework contained within the
12 curriculums for the degrees that I possess.

13 Q. Was there any?

14 A. Yes.

15 Q. Could you tell me about it?

16 A. I don't recall the exact names.

17 Q. Generally?

18 A. I don't recall the exact names.

19 Q. Well, how about the subject matter?

20 A. I would have to guess so I don't recall the exact
21 names.

22 Q. I don't want you to guess.

23 All right. Now, I'd like to focus, since
24 you've raised this, Mr. Kafer, on what you
25 described as VA trainings. I think you used that

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1 phrase? You've got to answer --

2 A. Yes.

3 Q. Those trainings included issues pertaining to
4 sexual harassment; is that correct?

5 A. Yes.

6 Q. I would like you to describe the format that you
7 were exposed to in those trainings. What are we
8 talking about: On-line? Attendance at meetings?
9 Coursework? Seminars? I don't know. You tell
10 me.

11 A. There were on-line trainings. I don't recall the
12 exact nature of training that we received to
13 become train the trainers for sexual harassment
14 as it was some time ago.

15 Q. Well, let me ask you when?

16 A. I don't remember.

17 Q. Well, within the last five years?

18 A. Yes.

19 Q. But when you say other than on-line trainings,
20 what's the format that you're talking about?

21 A. Where there would be a presenter or someone who
22 would be regarded as a subject matter expert that
23 would impart knowledge to attendees.

24 Q. I know this may be a difficult question to
25 answer. I want to know if you can answer it.

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1 How many on-line trainings ballpark do you
2 think you've actually listened to and watched?

3 A. I have no idea. I've been employed at the VA,
4 I'm in my 20th year.

5 Q. Well, it sounds like it could be in the dozens?

6 A. I don't know.

7 Q. Well, would it be more than 10?

8 A. I would have to guess.

9 Q. Once a year at least?

10 A. You said not to guess.

11 Q. No. I'm asking you that -- I don't want you to
12 guess -- didn't you at least once a year during
13 your tenure at the VA have on-line training that
14 dealt in part with sexual harassment?

15 A. I think there are more than once a year.

16 Q. Well, if you were there for 20 years, then it
17 could be 20, 30 on-line, something like that?

18 A. Are you informing me that it could be that many?

19 Q. I'm asking you.

20 A. I don't know. I would have to guess.

21 Q. I don't want you to guess. But approximately.
22 Let me -- withdrawn.

23 Let me give you a, maybe a format to answer
24 those kinds of questions. Okay? I certainly
25 don't want you to make some wild speculating

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1 guess. Okay?

2 And I'm not asking you for an exact number.

3 Okay? So I would think that would be kind of
4 speculative, okay? So it's not that.

5 I'm asking you for whether or not you can
6 have your best recollection of a rough estimate,
7 would I won't be holding you to any exact number
8 of times or to speculate about something like
9 that but I would be asking you for your best
10 recollection if you have one. Okay? Of the
11 rough approximate number of times and that's what
12 I'm trying to work through. Okay?

13 So if it's a wild guess without any idea at
14 all, I'm not -- then you can say it would be a
15 guess; but if you have some recollection -- and
16 I'm trying to help stimulate that with my
17 questions actually -- then I would like you to
18 give me your best rough estimate recollection.

19 Do you understand at least what I've just
20 said?

21 A. Yes.

22 Q. Good.

23 A. So I have no rough recollection. I do know that
24 there is a record of the trainings that I've
25 taken so if I wanted to answer that question, I

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1 would just refer to that record.

2 Q. Okay. And the, where is that record kept? Do
3 you have it?

4 A. It's an on-line record and it's, we can access it
5 and then I have, sometimes you can print out when
6 you complete trainings but you don't have to.
7 You're not required to print out.

8 Q. Is that something that can readily be obtained by
9 your counsel or by you and give to your counsel?

10 A. It could be obtained.

11 MR. SINDELL: So I'm asking for
12 it. And I would like that marked so I can
13 have a continuing list of what my various
14 requests are which I will not remember on
15 my own.

16 BY MR. SINDELL:

17 Q. Would you agree with me that whatever number of
18 on-line trainings you've had with issues
19 involving sexual harassment or meetings,
20 seminars, that type of thing, educational
21 programs dealing with that subject, it's been
22 fairly extensive? Would you agree with that?

23 A. "Fairly extensive"?

24 Q. Yeah. So you have a working knowledge of what
25 the issues are?

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1 A. Yes.

2 Q. That's all. I'm not asking you if you could
3 write a legal brief on it. I just want to know
4 that. Okay. So you've answered it. Thank you.

5 Now I want to ask you the same kinds of
6 questions about education and training on the
7 reasonable accommodation coordinator side of it.
8 Okay?

9 A. Uh-huh.

10 Q. Is that yes?

11 A. Yes.

12 Q. Okay. You know, trying to make a record here.

13 Maybe we can make this simple. Have you had
14 fairly extensive exposure to on-line trainings
15 and seminars and programs dealing with reasonable
16 accommodation issues?

17 A. Yes.

18 Q. Would it at least parallel to some degree the
19 extent of your training with fact finding EEO
20 kinds of issues?

21 A. Yes.

22 Q. Okay. Would you also -- withdrawn.

23 Do you agree with me that in order to be a
24 competent fact finder, you have to have that kind
25 of background and training in reasonable, excuse

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1 me, in areas of sexual harassment in order to be
2 an effective fact finder?

3 MS. JOHNSON: Objection. You may
4 answer.

5 A. Yes.

6 Q. And the same kind of knowledge would be necessary
7 to process reasonable accommodation claims
8 effectively, right?

9 A. Yes.

10 Q. Now I'd like to, there's a manual that the VA
11 has, I think it's called a handbook. In fact let
12 me be very specific.

13 Yes. There's a VA handbook and I have a few
14 pages from it but you've seen that handbook
15 before?

16 A. Yes.

17 Q. And would you agree with me that that handbook
18 sets forth references to rules, regulations,
19 considerations, discussions about reasonable
20 accommodation processes and issues?

21 A. Yes.

22 Q. Would you say the same for sexual harassment
23 issues?

24 A. That that handbook?

25 Q. Yes. Covers that subject?

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1 A. The VA handbook on reasonable accommodation does
2 not cover --

3 Q. No. No. There's a VA handbook also that --
4 well, maybe it's not called a handbook but there
5 are written VA observations, rules,
6 considerations written down about sexual
7 harassment?

8 A. Yes. There are policies.

9 Q. Okay. Policies. Appreciate that word. That
10 helps.

11 And when I talk about reasonable
12 accommodation that includes policies, right?

13 A. Yes.

14 Q. Would you consider yourself familiar with
15 policies in the reasonable accommodation area?

16 A. Yes.

17 Q. Would you consider yourself familiar with
18 policies in the sexual harassment area?

19 A. Yes.

20 Q. Okay. Now I'd like to talk to you about your
21 understanding of sexual harassment policies.

22 Okay? That's not a question. That's a
23 statement.

24 In order for -- withdrawn.

25 Sexual harassment can take verbal forms,

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1 correct?

2 A. Yes.

3 Q. And it can take physical forms, correct?

4 A. Yes.

5 Q. Or both?

6 A. Yes.

7 Q. Clearly sexual harassment, whatever that means,
8 which we'll discuss but let's just use that
9 phrase, is prohibited as between conduct of
10 employees and also supervisors at the VA?

11 MS. JOHNSON: Objection. You may
12 answer.

13 A. Yes.

14 Q. That's just a very general statement. It's also
15 against the law, isn't it?

16 A. Yes.

17 Q. And sexual harassment can be any kind of gender
18 combination.

19 In other words, a woman can sexually harass a
20 man, a man can sexually harass a man or same sex
21 as well; is that correct?

22 A. Correct.

23 Q. Now let's talk about verbal sexual harassment.

24 Would you agree with me that verbal sexual
25 harassment, and I think we've said this already,

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1 is completely distinguishable from physical
2 sexual harassment: One involves touching, one
3 involves communication and words?

4 A. Correct.

5 Q. Okay. Would you agree with me that sexual
6 harassment by one employee of another at the VA
7 would have to involve something offensive to the
8 recipient of the verbal communication from the
9 other employee?

10 MS. JOHNSON: Objection. You may
11 answer.

12 A. You're asking me if I would agree with you if
13 sexual harassment --

14 Q. It has to be something offensive. It has to
15 be -- withdrawn. I'll say it again differently.

16 In order for a communication from employee 1
17 to be sexually harass -- sexual harassment of
18 employee 2, that communication needs to be
19 offensive in some way to employee 2?

20 A. Yes.

21 Q. Now to make it sexual, it has to have some kind
22 of sexual content or implication as opposed to
23 non sexual?

24 A. Yes.

25 Q. Now, if employee 1 says something to employee 2

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1 that is offensive to employee 2, in and of itself
2 does that constitute sexual harassment?

3 MS. JOHNSON: Objection. You may
4 answer.

5 A. No.

6 Q. And why not?

7 A. Because there was no determination made as to
8 whether or not it was sexually offensive or
9 harassment -- or harassing.

10 Q. What do you mean by that? Can you expand that?

11 A. You gave me an example where one person said
12 something to another and you said is that
13 sexually harassing or offensive.

14 Q. Right.

15 A. So that example in and of itself in the context
16 in which we work would not be. There would have
17 to be a determination made about that.

18 Q. In order for a communication from employee 1 to
19 employee 2 to constitute sexual harassment by
20 employee 1 against employee 2, does employee 2
21 have to indicate to employee 1 that they find it
22 offensive?

23 A. No, they do not have to.

24 Q. Okay. If they don't do that, how does employee 1
25 know it's offensive?

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1 A. If employee 2 makes a sexual harassment complaint
2 or an allegation to management, then a fact
3 finding investigation would ensue. At some point
4 employee number 1 would be informed that employee
5 number 2 found some behavior sexually offensive.

6 Q. All right. Now, so if employee 1 -- withdrawn.

7 Do you recall your report in this case? Have
8 you reviewed it on the sexual harassment issue,
9 your fact finding report?

10 A. I briefly reviewed it.

11 Q. Do you recall concluding that there was no sexual
12 harassment?

13 A. Yes.

14 Q. Do you remember why?

15 A. No.

16 In general it would have been.

17 Q. She's trying to tell you not to say anything
18 more. That was a hint. She grabbed your arm and
19 said don't keep talking.

20 A. Withdrawn.

21 Q. Okay. Did you want to complete your answer
22 notwithstanding the coaching from your lawyer?

23 A. No. Thank you.

24 MR. SINDELL: I would appreciate
25 if you would not do that again, Lisa.

20 Q. Now you, I'm reading -- you know what? I'll give
21 it to you.

23 (Thereupon, Plaintiff's Exhibit 6, Kafer
24 Report of Investigation, was marked for
25 purposes of identification.)

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- - - - -
Q. All right. I'm going to hand you what's been
marked as Plaintiff's Exhibit 6. I want you,
Mr. Kafer, I want you to do what you're doing.
Take a minute or whatever time you need and read
through this and then I'll ask you some questions
about it.

A. Okay.

- - - - -
(Thereupon, a discussion was had off the
record.)

- - - - -
(Thereupon, Plaintiff's Exhibit 7, Kafer CV,
was marked for purposes of identification.)

- - - - -
MR. SINDELL: Back on the record.
Just for the record I am marking
as Number 7 Mr. Kafer's CV just so you know
that.

MS. JOHNSON: All right.

Q. Back on the record.
You've had an opportunity to read over
Exhibit 6; is that correct?

A. Yes.

Q. And could you identify this document, please,

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1 Mr. Kafer?

2 A. This is a document with the subject heading
3 "Report of Investigation Into Allegations of
4 Sexual Harassment CRNAs Complaints Against Ronald
5 Lisan, M.D."

6 Q. What does "Thru: EEO Affirmative Employment
7 Manager" mean?

8 What's that reference indicate?

9 A. That just means that the EEO affirmative
10 employment manager is aware that this report is
11 being sent to the medical center director.

12 Q. And who is the manager?

13 A. Andrea Freeman.

14 Q. Who is Leshelle Reese?

15 A. She is an EEO specialist.

16 Q. Does she report to Andrea Freeman?

17 A. Yes.

18 Q. What does the reference to Associate Medical
19 Center Director mean?

20 A. In a hierarchical chain of command, there is the
21 EEO affirmative employment manager. There is the
22 associate medical center director. There is the
23 medical center director at the top.

24 Q. And who's the, at this time, I don't know if this
25 has actually a date. I don't see a date on this

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1 thing. Did you date it?

2 MS. JOHNSON: I don't see one
3 either.

4 A. I do not see a date on my copy.

5 Q. Do you have any recollection of approximately
6 when this was issued?

7 A. I don't have an exact recollection.

8 Q. I didn't ask you for an exact recollection.
9 Approximate? If you don't, I can probably help
10 you.

11 A. No, I don't have an approximate recollection.

12 Q. Okay. Does this refresh your recollection that
13 it was, I think it was in March of 2017?

14 MS. JOHNSON: Objection. You may
15 answer.

16 Q. Does March of 2017 sound about right?

17 A. It may have been March of 2017.

18 Q. Okay. We can pin it down. That's not a big
19 deal.

20 Okay. Who was the associate medical center
21 director referenced at that time at the top of
22 this page?

23 A. I don't know.

24 Q. Who is the medical center director?

25 A. Susan Fuehrer.

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1 Q. And she was at this time, too, correct?

2 A. Correct.

3 Q. So you don't know who the associate was below
4 her?

5 A. No. Because our associate and our deputy like
6 would switch around so I don't know the exact
7 person.

8 Q. Does this mean that Susan Fuehrer would not have
9 gotten a copy of this?

10 A. She would have gotten a copy.

11 Q. How do you know?

12 A. Because that's the protocol that we follow.

13 Q. So let's -- okay. So it's to the medical center
14 director as you indicated?

15 A. Correct.

16 Q. So that means she got a copy?

17 A. Yes.

18 Q. And of course it's shown here that Dr. Raphaely
19 got a copy?

20 A. Correct.

21 Q. Did anybody else get a copy?

22 A. The associate medical center director would have
23 gotten a copy and the EEO affirmative employment
24 manager would have gotten a copy as well.

25 Q. Andrea Freeman?

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1 A. Correct.

2 Q. Do you report to Andrea Freeman?

3 A. Yes.

4 Q. Is that a direct reporting relationship?

5 A. Yes.

6 Q. All right. Now I'm going to leave this for some
7 questions later. I just wanted you to be aware
8 of it. Okay?

9 Now I'm going back to your understanding of
10 the protocols for sexual harassment reporting and
11 so forth. Okay?

12 You told me that somebody, employee 2 is the
13 one who allegedly was harassed in my example.
14 You remember that?

15 A. Yes.

16 Q. And I was giving you a verbal example, correct?

17 A. Correct.

18 Q. Employee 2 you testified does not have to express
19 an objection or indicate offensiveness to
20 employee number 1 at the time of the alleged
21 offensive communication; is that correct?

22 A. Correct.

23 Q. In order for it to be considered sexual
24 harassment?

25 A. Correct.

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1 Q. But it still can be considered sexual harassment
2 at some later point after investigation depending
3 on a lot of circumstances?

4 A. Yes.

5 Q. And your fact finding efforts are designed to
6 probe into that matter, whether it is or isn't
7 sexual harassment, the communication?

8 A. The fact finding investigation is to --

9 Q. That you do?

10 A. Correct. Particularly in this case --

11 Q. Yes.

12 A. -- was to obtain the facts related to the
13 allegation.

14 Q. Well, the purpose of doing that is to make a
15 determination, isn't it?

16 A. No. The purpose of doing the fact finding
17 investigation is to obtain the facts related to
18 the allegation.

19 Q. Yes. But that's not being done without any
20 purpose or reason. There's a reason you take the
21 time to investigate the facts, isn't there?

22 A. Yes. The reason is the allegation.

23 Q. Right. And the reason is to get what the facts
24 are as best as you can to reach some conclusions
25 about whether sexual harassment occurred?

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1 A. Is that a question or a statement?

2 Q. Yes.

3 A. What's the question please?

4 MR. SINDELL: Read it back to him.

5 THE NOTARY: "And the reason is to
6 get what the facts are as best as you can
7 to reach some conclusions about whether
8 sexual harassment occurred?"

9 A. Yes.

10 MR. SINDELL: Off the record.

11 - - - -

12 (Thereupon, a discussion was had off the
13 record.)

14 - - - -

15 Q. In this report, Exhibit 6; you did express some
16 conclusion as to whether or not there was sexual
17 harassment in the verbal exchanges that were
18 reported by the CRNAs; is that correct?

19 A. I expressed a conclusion.

20 Q. Now, going back to employee 1 and 2, employee 1
21 makes a communication to employee 2 which
22 employee 2 believes is offensive to employee 2,
23 believes it's sexually offensive to employee 2.

24 Employee 2 chooses not to express to employee
25 1 that it was offensive, employee 1's

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1 communication. Okay?

2 What can or should employee 2 do to remedy
3 the situation?

4 A. Employee 2 should report to management what
5 occurred.

6 Q. Can you define management? Well, withdrawn.

7 Do you know who Robert Bearss is? Bearss,
8 B-E-A-R-S-S, and I can tell you who if you don't
9 know.

10 A. No.

11 Q. Okay. There's a group of CRNAs obviously in the
12 anesthesia department. Mr. Bearss is called the
13 lead person. Okay? At least he's been described
14 that way by one CRNA.

15 So does that concept mean anything, a lead
16 CRNA?

17 MS. JOHNSON: Objection. You may
18 answer.

19 A. Lead in the VA generally connotes that that
20 individual has additional responsibilities and
21 they may vary depending on who this person is.

22 Q. Understand.

23 Okay. Would it be appropriate nomenclature
24 to characterize the lead CRNA as a first line
25 supervisor of the other CRNAs in the

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1 anesthesiology department?

2 MS. JOHNSON: Objection. You may
3 answer.

4 A. I don't know.

5 Q. Would a lead person in your understanding be the
6 kind of management person that employee number 2
7 in my example could go to?

8 MS. JOHNSON: Objection. You may
9 answer.

10 A. In some cases leads have management authority for
11 certain areas and in other cases they do not.

12 Q. Do you have any idea -- I'm sorry. Did you
13 finish your answer?

14 A. Yes.

15 Q. Do you have any idea, Mr. Kafer, whether the lead
16 person, Robert Bearss, would be an appropriate
17 person for a subordinate CRNA in the anesthesia
18 department to go to with that kind of concern
19 about offensive communication of a sexual nature?

20 A. No.

21 Q. Do you know whether or not Mr. Bearss,
22 B-E-A-R-S-S, is considered a management person at
23 the VA with management authority?

24 A. No.

25 Q. Okay. I'm going to ask you to assume that he

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1 was.

2 Would that change your answer as to whether
3 or not he would be an appropriate possible person
4 for a CRNA to go to to complain about another
5 employee communicating offensive sexually
6 harassing communications?

7 MS. JOHNSON: Objection. You may
8 answer.

9 A. You're asking me to make an assumption?

10 Q. Assume he's in a management position with
11 management authority.

12 A. If Mr. Bearss was a member of management and an
13 ensuing process occurred related to sexual
14 harassment allegations, then he would have been
15 an appropriate person.

16 Q. Okay. Now, Dr. Susan Raphaely was the, I don't
17 know if they call her the head or the chair?

18 A. Chief.

19 Q. Chief, okay. That's good.

20 Chief of the anesthesiology department. You
21 know that?

22 A. Uh-huh.

23 Q. You have to say yes.

24 A. Yes.

25 Q. Okay. She would clearly be in a management

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1 position, right?

2 A. Correct.

3 Q. So would it have been appropriate for a CRNA who
4 had some kind of complaint about another member
5 of the anesthesia department communicating some
6 offensive sexual harassing remark to go to
7 Dr. Raphaely?

8 A. Yes.

9 Q. Now let's add an assumption to the other
10 assumptions that that occurred. That's not a
11 question.

12 MS. JOHNSON: No. I know.

13 Q. Okay. Let me say it again.

14 Let's assume that a CRNA went to Dr. Raphaely
15 with such a complaint. Can you --

16 A. Okay.

17 Q. -- make that assumption? In fact that occurred
18 here?

19 MS. JOHNSON: Objection.

20 MR. SINDELL: Which are you
21 objecting to? "In fact that occurred"?

22 MS. JOHNSON: Yes. Because you're
23 testifying.

24 MR. SINDELL: I'm asking a
25 question.

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1 MS. JOHNSON: You're saying this
2 is what happened here. That's testifying.

3 Q. In fact that occurred? Question mark. Is that
4 right?

5 A. You're asking what occurred?

6 Q. I'm asking you a simple question:

7 Isn't it a fact that four CRNAs reported
8 complaints of Dr. Lisan verbally sexually
9 harassing them to Dr. Raphaely? Isn't that in
10 fact what happened in this case? I think you
11 repeated it four or five times in here.

12 A. I don't know if all four complainants went
13 directly to Dr. Raphaely or if they came to the
14 EEO office first.

15 Q. Okay. Do you know if any of them did? Any of
16 the four? Went to Dr. Raphaely?

17 A. I don't know. I do know that they eventually
18 were all interviewed by Leshelle and me.

19 Q. I do know that. You know that. You've reported
20 that.

21 A. Right.

22 Q. But I'm asking you something else.

23 So as far as I understand you, you don't know
24 if any of them or all of them or some of them
25 went directly first to Dr. Raphaely?

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1 A. Correct.

2 Q. Okay. You were doing an investigation of the
3 facts about this, weren't you?

4 A. Yes.

5 Q. Okay. Would that be an important fact as to
6 where they went first?

7 A. It would only be a fact to note.

8 For instance, there would be no requirement
9 to go to Dr. Raphaely first. If they came to the
10 EEO office first, a fact finding investigation
11 could ensue.

12 Q. Isn't it a fact that it is important for you to
13 know as a fact finder where the CRNA made a
14 complaint for the first time about any sexual
15 harassment from Dr. Lisan?

16 A. When you're initially responding to a complaint
17 or an allegation, you would know that at the time
18 of the complaint.

19 However, in this forum, I may not be able to
20 recall those specifics.

21 Q. Did you -- well, wouldn't that be something you
22 would put in your report, that they first went to
23 Dr. Raphaely? Isn't that a fact that you would
24 think would go in such a report of fact finding?

25 A. You're asking me would that be something that I

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1 would put into my report?

2 Q. Yes. That's exactly what I'm asking you.

3 A. Not necessarily.

4 Q. Isn't it something that you would want to find
5 out?

6 A. It would have been something I would have known
7 at the time.

8 Q. Okay. Well, in making a full fact finding
9 investigation, wouldn't it be important for you
10 to know what the communication was initially by
11 the person, the CRNA making the complaint?

12 A. Can you repeat the question.

13 THE NOTARY: "Well, in making a
14 full fact finding investigation, wouldn't
15 it be important for you to know what the
16 communication was initially by the person,
17 the CRNA making the complaint?"

18 A. The most important thing to know would be what is
19 the nature of the complaint.

20 Q. Wouldn't it be important to know in considering
21 the facts what the original communication was
22 with the first person to whom the complaint was
23 communicated in management?

24 A. It would be most important to know which
25 management official was communicated to which

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1 would reflect the allegation which you would then
2 investigate.

3 Q. Excuse me. I didn't ask you what was most
4 important. Now I want her to read back the
5 question and I want you to answer it if you can
6 the way I asked it. Answer my question.

7 Please repeat the question.

8 THE NOTARY: "Wouldn't it be
9 important to know in considering the facts
10 what the original communication was with
11 the first person to whom the complaint was
12 communicated in management?"

13 A. Yes.

14 Q. Okay.

15 A. But the level of importance may be different.

16 Q. I didn't ask you about level of importance.

17 A. But that's my answer.

18 Q. But you're supposed to answer my questions.

19 A. I did.

20 Q. Okay. That's fine.

21 Now, wouldn't it be important for you in
22 making a fact finding investigation to speak to
23 Dr. Raphaely if in fact all of the CRNAs first
24 communicated their complaints about Dr. Lisan to
25 Dr. Raphaely?

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1 MS. JOHNSON: Objection. You may
2 answer.

3 A. So you're asking me a conditional question.

4 **Q. I don't want you to characterize it.**

5 A. Because you have included the word "if."

6 **Q. I want you to just answer the question, not**
7 **characterize it.**

8 **Please repeat the question, and just answer**
9 **it.**

10 THE NOTARY: "Now, wouldn't it be
11 important for you in making a fact finding
12 investigation to speak to Dr. Raphaely if
13 in fact all of the CRNAs first communicated
14 their complaints about Dr. Lisan to
15 Dr. Raphaely?"

16 A. Yes.

17 **Q. Did you?**

18 A. Yes.

19 **Q. You talked to Dr. Raphaely about the complaints**
20 **that were made to her by the CRNAs?**

21 A. At some point I talked to Dr. Raphaely.

22 **Q. I thought you said --**

23 A. Along with Leshelle Reese.

24 **Q. I thought you said you didn't remember that?**

25 A. What do you mean?

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1 Q. I thought you said you didn't know whether the
2 CRNAs ever went to Dr. Raphaely when they first
3 made their complaints about Dr. Lisan, didn't
4 you?

5 MS. JOHNSON: Objection. That
6 mischaracterizes the prior testimony.

7 MR. SINDELL: You really think so?

8 MS. JOHNSON: Yes, I do think so.
9 Would you go back to the question where he
10 asked whether he knew that, whether the
11 CRNAs went to Dr. Raphaely or not? And he
12 said he didn't know and now you're
13 characterizing it as he said that he didn't
14 know if he talked to Dr. Raphaely or not.
15 Those are two different questions.

16 Q. Okay. Let me, they may be, but let me -- read it
17 back. Read back the question I asked and see if
18 you can answer it, please.

19 THE NOTARY: "I thought you said
20 you didn't know whether the CRNAs ever went
21 to Dr. Raphaely when they first made their
22 complaints about Dr. Lisan, didn't you?"

23 A. Correct. It was a question about who they
24 initially went to and then I reviewed that they
25 could either come to the EEO office first or they

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1 may have come to Dr. Raphaely first.

2 Q. Did you know that Dr. Raphaely -- withdrawn. Did
3 you know at the time you first learned that there
4 was -- withdrawn.

5 When you first learned there were CRNA
6 complaints of sexual harassment against
7 Dr. Lisan, did you know that prior to that time
8 Dr. Lisan had communicated a complaint of
9 disability discrimination and gender
10 discrimination about Dr. Raphaely to VA
11 management including Dr. -- or Ms. Fuehrer and
12 Dr. Altose?

13 A. I don't know.

14 Q. Do you think that would have been something of
15 any interest to you at that time to know?

16 A. No.

17 Q. Okay.

18 MS. JOHNSON: Steve, could we
19 possibly take like a five minute break.

20 MR. SINDELL: We can certainly do
21 that.

22 - - - -

23 (Thereupon, a discussion was had off the
24 record.)

25 - - - -

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1 Q. I'd like to for now switch to reasonable
2 accommodation. Okay?

3 A. Okay.

4 Q. And do you have any files or records that you
5 keep dealing with your processing of Dr. Lisan's
6 claim of reasonable accommodations?

7 A. Yes.

8 Q. You didn't bring it with you?

9 A. No.

10 MS. JOHNSON: I have not had a
11 chance to review those, Steve, so we'll
12 provide them.

13 MR. SINDELL: I'm sure but I may
14 have some questions about them.

15 MS. JOHNSON: Sure.

16 Q. Then we may have the pleasure of meeting again if
17 that happens.

18 A. Okay.

19 Q. But it won't be as long.

20 But I have some documents.

21 A. Okay.

22 Q. Do you recall that it was in early December of
23 2016 that Ron returned from a leave?

24 A. I recall receiving information sometime in
25 December related to Dr. Lisan's request for

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1 reasonable accommodation.

2 Q. All right. I think these documents will refresh
3 your recollection.

4 A. Okay.

5 Q. Some of this, by the way, you may not be privy to
6 but it might be helpful in refreshing?

7 - - - -

8 (Thereupon, Plaintiff's Exhibit 8, 12/8/16
9 Raphaely "Questions" email to Lisan, was
10 marked for purposes of identification.)

11 - - - -

12 Q. I'm going to hand you what's been marked as
13 Exhibit 8.

14 This is 8 for me and let's just pass these
15 around?

16 DR. LISAN: Is it just the one
17 page?

18 Q. Yes.

19 Exhibit 8, I'll identify it, is apparently an
20 email from Dr. Raphaely dated December 8, 2016 to
21 Dr. Lisan which I'd like you to just read.

22 A. "Ron: Hope your return" --

23 Q. No, not out loud.

24 To yourself.

25 A. I thought you wanted me to read it out loud.

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1 MS. JOHNSON: That was a good
2 story time voice.

3 A. I read it.

4 Q. Okay. Go ahead.

5 A. I did read it.

6 Q. All right. I'm using this partly to give you a
7 time frame.

8 Dr. Lisan returned on December 7th, 2016,
9 physically returned after a period of time away.
10 Right?

11 A. That is my understanding.

12 Q. Okay. And Dr. Raphaely is writing: "Hope
13 your" -- I'll read part of it.

14 "Hope your return is going smoothly. I spoke
15 with Dr. Altose."

16 Do you know who Dr. Altose is?

17 A. At the time Dr. Altose was the chief of staff.

18 Q. So she would be the immediate superior to
19 Dr. Raphaely; is that right?

20 A. Correct.

21 Q. "I spoke with Dr. Altose about making no call
22 accommodations for you."

23 Did I read that correctly?

24 A. Yes.

25 Q. "Is this something you can have your doctors

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1 request on a more formal basis?" With a question
2 mark, right?

3 A. Yes.

4 Q. Then it says, "What are your thoughts about
5 covering late duty?"

6 Do you know what late duty is?

7 A. No. I assume it's duty that occurs late.

8 Q. Yes.

9 A. We're a 24 hour facility.

10 Q. Okay. Late duty in this case means beyond the
11 regular workday and it is, I don't want to get
12 into a long confusing discussion about on call,
13 first on call, third on call but I think you know
14 what on call means?

15 A. Yes.

16 Q. That's like following a workday or part of a
17 workday you stay beyond that and you're on call
18 in case there's an emergency and you're away from
19 the facility; is that correct?

20 A. Correct.

21 Q. But that could be a 24 hour obligation in an
22 anesthesiologist's case because you're operating
23 on a 24 hour basis. By that I mean medically
24 operating?

25 A. Correct.

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1 Q. Then she asks, "Lastly, are you able to cover the
2 Christmas holidays as originally planned?" And
3 then, "I look forward to hearing from you."
4 Okay?

5 A. Uh-huh.

6 Q. So that kind of gives you a time frame that we're
7 looking at and she's asking him about making no
8 call accommodations, correct?

9 A. She is asking him if this is something you can.

10 Q. No, she's not asking him. You're right.

11 She's telling him, Dr. Raphaely is telling
12 Dr. Lisan that she had discussed with Dr. Altose
13 making no call accommodations, correct?

14 A. No. She said she spoke with Dr. Altose about
15 making no call accommodations for you. She does
16 not mention the discussion. She asks.

17 Q. I don't want to mince words with you. She spoke
18 to her about it?

19 A. She asked a specific question.

20 Q. Right. So she raised the question apparently or
21 communicated in some way with Dr. Altose about
22 making no call accommodations for Dr. Lisan,
23 right? That's pretty clear, isn't it?

24 I don't want to sit here discussing spoke to,
25 said it.

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1 I mean, you know there was communication on
2 that subject?

3 MS. JOHNSON: Objection. You may
4 answer.

5 Q. Right? It speaks for itself. It's very clear,
6 isn't it?

7 A. There is a written communication.

8 Q. All right.

9 A. From Dr. Raphaely to Dr. Lisan.

10 Q. Right. Which says that?

11 A. Where she asks him a specific question about
12 having his doctor request on a more formal basis.
13 That is what I see.

14 Q. Okay. And what I'm concentrating on is the
15 previous sentence which represents from
16 Dr. Raphaely to Dr. Lisan that she spoke with
17 Dr. Altose about making no call accommodations
18 for Dr. Lisan. Is that correct?

19 MS. JOHNSON: Objection. You may
20 answer.

21 A. I have no knowledge about what Dr. Raphaely spoke
22 to Dr. Altose about.

23 All I know is what is written in this email
24 where she states, "I spoke with Dr. Altose about
25 making no call accommodations for you."

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1 Q. Okay. Is there anything about that sentence that
2 you don't understand?

3 A. No.

4 Q. Thank you. All right. Now, are you --
5 withdrawn.

6 In your processing of Dr. Lisan's reasonable
7 accommodation request did you learn one way or
8 the other whether Dr. Raphaely had previously
9 told Dr. Lisan that Dr. Raphaely thought that a
10 no accommodation -- I'm sorry, a no call
11 accommodation was doable or words to that effect?

12 MS. JOHNSON: I'm sorry. I didn't
13 get all of that question.

14 MR. SINDELL: I'll say it again.

15 MS. JOHNSON: Or I was just going
16 to have her read it back. I just didn't
17 hear it.

18 MR. SINDELL: Oh, you didn't hear
19 it?

20 MS. JOHNSON: Yes, I didn't hear
21 it, Steve. I wasn't trying to interrupt.

22 MR. SINDELL: Read it back.

23 THE NOTARY: "In your processing
24 of Dr. Lisan's reasonable accommodation
25 request did you learn one way or the other

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1 whether Dr. Raphaely had previously told
2 Dr. Lisan that Dr. Raphaely thought that a
3 no accommodation -- I'm sorry, a no call
4 accommodation was doable or words to that
5 effect?"

6 MS. JOHNSON: Okay. Thank you.

7 A. I don't know.

8 Q. Did you ever ask that question to Ron Lisan about
9 his reasonable accommodation request?

10 A. Ask what question?

11 Q. Whether or not he was told --

12 A. I don't recall.

13 Q. Wait. I've got to finish my question. I'm
14 sorry.

15 Did you ever ask Ron Lisan in connection with
16 your reasonable accommodation processing whether
17 he had any discussions with Dr. Raphaely about
18 whether a no call accommodation was doable?

19 A. I don't recall.

20 Q. Would that be in your notes?

21 A. It does not seem like the type of question I
22 would ask in the processing of a reasonable
23 accommodation request.

24 Q. Okay. I got it.

25 - - - -

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1 (Thereupon, Plaintiff's Exhibit 9, 12/16/16
2 Marciano note to Roach, was marked for
3 purposes of identification.)

4 - - - -
5 Q. Let's take a look at Exhibit 9.

6 Okay. This is Exhibit 9.

7 MS. JOHNSON: This is 9, right?

8 Q. Yes.

9 Would you take a look at Exhibit 9 please?

10 A. Yes.

11 Q. Do you recall receiving this document as part of
12 submissions from Dr. Lisan to you in connection
13 with your processing of the reasonable
14 accommodation request?

15 A. Yes.

16 Q. And it's simply a letter from what appears to be
17 an LISW, social worker?

18 A. Yes.

19 Q. Who's Kevin Roach?

20 A. I think he is an administrative officer within
21 surgical service.

22 Q. Okay. Do you know --

23 A. At least that's what he is now because I had
24 recent -- I don't remember if he was at the time.

25 Q. I'm sorry. Go ahead. What did you just say?

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1 A. I am aware that Kevin Roach is an administrative
2 officer. He may have been the administrative
3 officer in anesthesiology service at the time.

4 MS. JOHNSON: And did you say now
5 he's in the surgery service?

6 A. It may be medicine service. It's one of those.

7 Q. Would it be helpful for you to assume that -- is
8 it Dr. or Mr.?

9 DR. LISAN: Mr. Roach.

10 Q. Mr. Roach was with anesthesiology at the time of
11 this communication of December 16, 2016 in
12 Exhibit 9?

13 MS. JOHNSON: I'm going to object.
14 You may answer.

15 A. I don't know if it would be helpful for me to
16 assume that; but I know that these administrative
17 officer persons like Mr. Roach all play a similar
18 role when it comes to reasonable accommodation
19 requests.

20 Q. And what's the role?

21 A. Typically they pass on information from a
22 requester to either a service chief or to me.

23 Q. And when you say a service chief, who would the
24 service chief be in this case?

25 A. Dr. Raphaely.

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1 Q. Does Dr. Raphaely play any role at all in the
2 reasonable accommodation request?

3 A. Yes.

4 Q. What would that be?

5 A. She would, in the face of a request, she would
6 pass information to me and then ultimately she
7 would have the final decision-making authority
8 about the provision of an accommodation as to
9 whether to provide it or to deny it.

10 Q. She decides whether or not there should be a
11 reasonable accommodation as requested or not?

12 A. Correct.

13 Q. Doesn't anybody else have anything to say about
14 that?

15 A. When you say "have anything to say about it,"
16 what does that mean?

17 Q. Well, I mean doesn't anybody else review it and
18 make a decision above Dr. Raphaely or separate
19 and apart from her?

20 A. No. Dr. Raphaely has the authority to make a
21 decision.

22 Q. Okay. Does she make the final decision?

23 A. Yes.

24 Q. Is there anyone else who participates in making
25 that final decision?

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1 A. No.

2 Q. So the chief of the department would be the
3 appropriate person in this case to decide whether
4 or not Ron Lisan's reasonable accommodation
5 request would be accepted or denied?

6 A. Correct.

7 Q. What about Dr. Altose? Does he have anything --
8 withdrawn.

9 Did Dr. Altose as the medical director have
10 any role in the decision to grant or deny
11 reasonable accommodation?

12 A. No.

13 Q. Is there any reason you can understand why
14 Dr. Raphaely wanted to check on that matter with
15 Dr. Altose?

16 A. I have no knowledge as to why she checked with
17 Dr. Altose.

18 Q. But she did not need to, did she?

19 A. I don't know. You're asking me about
20 Dr. Raphaely's needs?

21 Q. Yes. I'm asking you whether -- withdrawn.

22 She had no obligation to consult with him.
23 She could have made the decision all by herself
24 if she chose, right?

25 A. I don't know. She may have wanted to consult

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1 Dr. Altose for some reason that I'm unaware of.

2 Q. Okay. Here's my question.

3 There's nothing of course that would prevent
4 a chief of a department of anesthesiology from
5 consulting with anyone about a reasonable
6 accommodation decision, correct? I mean within
7 the VA?

8 A. As long as it was a professional consultation.

9 Q. Yes. Yes.

10 A. Okay. Then yes.

11 Q. I mean she could consult with Dr. Altose, she can
12 consult with you. She can consult as I
13 understand you with anybody who might have
14 knowledge to give her about it. Right?

15 A. Perhaps.

16 Q. Well, she could if she chose?

17 A. If she chose to, yes.

18 Q. Okay. Now, when you're processing a reasonable
19 accommodation request, is it part of your job to
20 communicate with the, in this case, physician,
21 Dr. Lisan, making the request?

22 A. Yes.

23 Q. Okay. I think they call that the interactive
24 process, don't they?

25 A. Correct.

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1 Q. And you're familiar with that, aren't you?

2 A. Correct.

3 Q. And that's something that falls within your
4 responsibility; isn't it?

5 A. Correct.

6 Q. Let me be clear about something.

7 You've testified that the final decision on
8 reasonable accommodation rests exclusively with
9 Dr. Raphaely in this case?

10 A. Yes.

11 Q. On what do you base that? Where does that
12 statement you're making come from?

13 A. The VA policy that's in the handbook on
14 reasonable accommodation.

15 Q. Did you review those policies in preparation for
16 this deposition?

17 A. No.

18 - - - -

19 (Thereupon, Plaintiff's Exhibit 10, 12/19/16
20 Raphaely "Reasonable accommodations" email to
21 Kafer, et al., was marked for purposes of
22 identification.)

23 - - - -

24 Q. All right. This is Exhibit 10.

25 All right. I'd like you to take a look at

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1 **Exhibit 10 if you would, please.**

2 A. Okay.

3 **Q. Oh, I'm sorry. Have you read it?**

4 A. Yes.

5 MR. SINDELL: Off the record.

6 - - - -

7 (Thereupon, a discussion was had off the
8 record.)

9 - - - -

10 **Q. Now, this, do you have any recollection of this**
11 **email?**

12 A. Yes. Now that I'm reviewing it, I recall this
13 email.

14 **Q. Good. Let's just identify Exhibit 10, this**
15 **email.**

16 It's from Dr. Raphaely sent December 19,
17 Monday December 19, 2016 at 10:50 a.m. in the
18 morning to you, correct?

19 A. Correct.

20 **Q. To Dr. Lisan, correct?**

21 A. Correct.

22 **Q. Who is Jelena Zekanovic?**

23 A. She was the employee labor relations specialist
24 at the time. She is considered a subject matter
25 expert in human resources.

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1 Q. Any particular reason you can understand why she
2 would be copied on this?

3 A. Normal protocol.

4 Q. Kevin Roach is copied and we've talked about him,
5 right?

6 A. Correct.

7 Q. And who is Shawn Beham?

8 A. He was a assistant reasonable accommodation
9 coordinator at the time and an EEO specialist.

10 Q. Why would he get a copy of this?

11 A. Because he would assist me with cases.

12 Q. Was he assisting you on this case?

13 A. Not to my recollection.

14 Q. Okay. So it's a formality in this case for him?

15 A. Right. In the event I'm absent or...

16 Q. No, I understand.

17 And the subject of course as indicated is
18 reasonable accommodations, correct?

19 A. Correct.

20 Q. Now this is, as follows, the way it's written:

21 "Bruce: I am reaching out to you for your
22 assistance with a request I have received for
23 accommodations by Dr. Ronald Lisan."

24 Did I read that correctly?

25 A. Yes.

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1 Q. There's nothing unusual about a department chief
2 writing to you with a question like that, or
3 reaching out to you?

4 A. Yeah. It's typical.

5 Q. Typical, okay.

6 "Dr. Lisan is a long-standing member of the
7 anesthesia department and due to changes in his
8 health status, he is stating he is unable to
9 participate in call."

10 Did I read that correctly?

11 A. Yes.

12 Q. Did you ever ask Dr. Lisan if he was stating he
13 is unable to participate in call?

14 A. I don't recall ever asking him that specific
15 question.

16 Q. Do you ever recall sitting down with him
17 face-to-face and discussing his request with him?

18 A. I recall we had a meeting where we sat down and
19 you were on the phone but I don't recall the
20 nature of our discussion.

21 Q. Okay. Well, that was a discussion about EEO
22 matters, if you'll recall. That had nothing to
23 do with reasonable accommodation.

24 A. In reasonable accommodation, the interactive
25 process is mainly accomplished through email.

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1 Q. Wait. Wait. You're not answering a question.
2 You're just talking about something else.

3 Let's stay with your last remark.

4 You said you recalled a conversation with me
5 on the phone. Okay?

6 That was not a conversation about reasonable
7 accommodation at all, was it? If you can recall?
8 We didn't discuss that at all?

9 A. I don't know. That was the only conversation I
10 can recall where we sat down. You asked me did
11 you sit down with Dr. Lisan. That was the one I
12 recalled.

13 Q. Okay. So now my next question is: Is it your
14 recollection that in that conversation where I
15 was present on the phone, correct?

16 A. Yes.

17 Q. That reasonable accommodation was discussed?

18 A. I have no recollection of what we discussed at
19 that meeting where I sat down in person with
20 Dr. Lisan.

21 Q. There were other people present in your office at
22 that time; is that correct?

23 A. Yes. I recall others being present.

24 Q. Matter of fact, it was Carlton Daniel was
25 present, wasn't he? Union guy?

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1 A. Maybe.

2 **Q. You don't recall for sure?**

3 A. I don't recall for sure. I know other people
4 were there.

5 MS. JOHNSON: Can we just go off a
6 record for a second.

7 - - - - -

8 (Thereupon, a discussion was had off the
9 record.)

10 - - - - -

11 **Q. See if this refreshes your recollection.**

12 Do you recall refusing to discuss anything
13 about reasonable accommodation at that meeting?

14 A. I don't recall the content of what we discussed
15 at that meeting.

16 **Q. Do you recall when it was?**

17 A. No.

18 **Q. Do you recall that his reasonable accommodation**
19 **had been rejected by the time of that meeting?**

20 A. No.

21 **Q. Okay.**

22 A. All I recall is we had one meeting.

23 **Q. Do you remember at that meeting that I spoke on**
24 **the phone?**

25 A. Yes.

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1 Q. Do you remember at that meeting I asked you to
2 recuse yourself?

3 A. No.

4 Q. You don't remember that?

5 A. No.

6 Q. Okay. Do you remember that I asked you to recuse
7 yourself because you had already dealt with the
8 reasonable accommodation issue?

9 MS. JOHNSON: Objection. You may
10 answer.

11 A. No.

12 Q. You're not denying it. You just don't recall,
13 right?

14 A. Correct.

15 Q. All right. Reading on, if you'll follow me,
16 please, with this. Oh, withdrawn. Let me just
17 ask you this:

18 Is it your testimony that the only
19 face-to-face meeting that you had with Dr. Lisan
20 was this meeting where I was on the phone?

21 A. No. I'm not testifying to that.

22 Q. Were there others?

23 A. I don't know. There may have been others.

24 Q. Do you recall any others?

25 A. I recall Dr. Lisan coming to the office but I

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1 don't recall the nature of his appearance in the
2 office.

3 Q. Do you recall any discussions directly with
4 Dr. Lisan face to face about his reasonable
5 accommodation request?

6 A. Not at this moment.

7 Q. Now she goes on, "she" being Dr. Raphaely, and
8 says: "After much consideration, I feel that as
9 a department we're are unable" -- I'm going to
10 start that again.

11 "After much consideration, I feel that as a
12 department we are unable to meet his request."

13 Did I read that correctly?

14 A. Yes, the second time.

15 Q. Right. Thank you for that.

16 A. You're welcome.

17 Q. Now, would you agree with me that the
18 characterization of Dr. Lisan's request for
19 reasonable accommodation as indicated in this
20 email by Dr. Raphaely is that he not be required
21 to participate in on-call duty?

22 A. No. I don't agree with you.

23 Q. Okay. What do you think it means when it says
24 "due to changes in his health status he is
25 stating he is unable to participate in call"?

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1 A. What I think that means is he has made a
2 statement. I have no way of knowing in the realm
3 of reasonable accommodation whether that
4 statement is true or not.

5 **Q. I didn't ask you that.**

6 A. Only that he has made that statement.

7 **Q. I don't think you followed my question,**
8 **Mr. Kafer, so I'm going to ask her to read the**
9 **question before this last one and listen**
10 **carefully to it because I don't think you're**
11 **answering my question.**

12 THE NOTARY: "What do you think it
13 means when it says "due to changes in his
14 health status he is stating he is unable to
15 participate in call?"

16 MS. JOHNSON: Objection. You may
17 answer.

18 **Q. I just asked you what do you think that means?**

19 A. It means that Dr. Lisan has made a statement
20 about his health status and this is the type of
21 typical statements people make when they're
22 making reasonable accommodation requests.

23 **Q. Okay. I don't care whether it's typical or not.**

24 **Unable to participate in call is a**
25 **representation by Dr. Raphaely of Dr. Lisan's**

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1 **reasonable accommodation request, correct?**

2 A. A representation, yes.

3 **Q. Okay. Did you have any reason to believe or**
4 **disbelieve Dr. Raphaely's representation?**

5 A. No. Her representation was essentially
6 irrelevant.

7 **Q. Man, I didn't ask you if it was irrelevant or**
8 **relevant or good or bad or anything. I just**
9 **asked you one question about it.**

10 **Would you read it back. And please answer**
11 **that question.**

12 MS. JOHNSON: Objection. He did
13 answer that question.

14 A. I already answered that question.

15 MR. SINDELL: Yeah, but he's
16 throwing in a lot of other stuff.

17 A. Is that prohibited?

18 **Q. Yeah, you're supposed to answer the question, not**
19 **some other question.**

20 MS. JOHNSON: I'm going to object,
21 Steve. He did answer the question.

22 MR. SINDELL: Okay.

23 MS. JOHNSON: I think if Pam reads
24 back his answer, he did answer the
25 question.

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1 MR. SINDELL: Yes. But he
2 included in his answer, though, a non
3 answer to the question.

4 MS. JOHNSON: Well, he's a allowed
5 to include whatever explanation he believes
6 is appropriate in an answer.

7 MR. SINDELL: That's not an
8 explanation.

9 A. Yes, it was.

10 Q. I would appreciate if you could at least confine
11 yourself just to completely answering my
12 questions. Okay?

13 A. But I am aware your questions have to do with
14 reasonable accommodation in this case so I want
15 to make sure that you're informed.

16 Q. In any event, you write -- she writes, I'm sorry.

17 "After much consideration, I feel that as a
18 department we are unable to meet his request."

19 Now I'm going to ask you this question: Did
20 I read that correctly first of all?

21 A. Yes.

22 Q. Okay. She writes, and I'm repeating it, "We are
23 unable to meet his request," meaning Dr. Lisan's
24 request, correct?

25 A. Correct.

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1 Q. Tell me what you understand Dr. Lisan's request
2 to have been in this email.

3 A. That there was an assertion he made that he was
4 unable to do call.

5 Q. That he was requesting not to have call?

6 A. That was his request.

7 Q. Okay. And for how long was he requesting not to
8 have call?

9 A. I don't remember. I only remember that it was
10 temporary.

11 Q. Do you remember how temporary?

12 A. No.

13 Q. Now it says, "Taking call is" -- withdrawn.

14 Did you ever ask Dr. Raphaely the length of
15 time that he was requesting not to take call?

16 A. I don't recall if I asked Dr. Raphaely for the
17 length of time.

18 I believe I was informed otherwise.

19 Q. What do you mean, "otherwise"?

20 A. I recall there was documentation that Dr. Lisan
21 had provided which stated or suggested how long
22 his temporary request was for.

23 Q. Do you know who stated it?

24 A. No.

25 Q. "Taking call is an essential position" -- I'm

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1 **sorry.**

2 **"Taking call is an essential function of his**
3 **position."**

4 **Did I read that correctly?**

5 A. Yes.

6 Q. Did you ever discuss what an essential function
7 was with Dr. Raphaely?

8 A. No.

9 Q. Did she ever ask you what an essential function
10 was?

11 A. No.

12 Q. Is that a term of art so to speak in the handbook
13 defining what it is?

14 A. Yes.

15 Q. Do you know whether or not Dr. Raphaely
16 understood the VA's definition in the handbook of
17 essential function?

18 A. Yes.

19 Q. How do you know she knew that?

20 A. Because Dr. Raphaely is the service chief of the
21 department and you cannot ascend to that position
22 without understanding what the essential
23 functions are of an anesthesiologist.

24 Q. Well, whether she actually understood it or not
25 is, as defined by the VA handbook, is something

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1 you don't know; is that correct?

2 A. Are you asking me if she understood the
3 definition of essential function as it's
4 described in the VA handbook on reasonable
5 accommodation?

6 MR. SINDELL: Read him back the
7 question. I think it's clear. Go ahead.

8 THE NOTARY: "Well, whether she
9 actually understood it or not is, as
10 defined by the VA handbook, is something
11 you don't know; is that correct?"

12 A. I have no knowledge if she is aware of the VA
13 handbook.

14 Q. Okay. But isn't essential function something
15 that is specifically defined by the VA handbook?

16 A. Yes.

17 Q. So it's not just out of the dictionary,
18 "essential function" I mean as a loose form of
19 discussion. I mean it's a very specific term
20 with meaning?

21 A. Yes.

22 Q. And you're saying she's supposed to know that?

23 A. Yes.

24 Q. Because she is a department chief, correct?

25 A. I'm saying she would know what an essential

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1 function of his position is as she wrote in this
2 email. That is what I'm saying.

3 **Q. And when you say, "what an essential function is"**
4 **that she would know, you mean as defined in the**
5 **VA handbook?**

6 A. No.

7 **Q. Then that's --**

8 A. I'm not saying that she is referencing the VA
9 handbook in this email.

10 I'm saying that she is referencing an
11 essential function of his position because she
12 holds her position as service chief and is
13 knowledgeable about what the essential functions
14 of an anesthesiologist are.

15 **Q. Okay. In a medical sense?**

16 A. Correct.

17 **Q. But not in a definitional sense from the**
18 **handbook?**

19 A. I have no knowledge if she knows anything about
20 the handbook.

21 **Q. Okay. Did you think it was important for her to**
22 **be informed by you as to what the VA defined an**
23 **essential function as?**

24 A. Did I think it was important at that time or
25 currently?

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1 Q. Yes, sir, at that time.

2 A. I don't recall if I thought that.

3 Q. Did you assume that she knew what the VA handbook
4 definition of essential function was?

5 A. I don't recall making any assumptions about
6 Dr. Raphaely and her knowledge about the VA
7 handbook and the definition of essential
8 function.

9 Q. Did she ever ask you to describe for her what was
10 an essential function as defined by reasonable
11 accommodation rules in the VA handbook?

12 A. I do not recall.

13 Q. Okay. Could you have told her if she did?

14 A. Of course.

15 Q. Your job as processing a reasonable accommodation
16 claim -- withdrawn.

17 In fulfilling your responsibility as the
18 reasonable accommodation coordinator, do you have
19 a job description for that role?

20 A. Yes.

21 Q. Do you know where it is?

22 A. Yes.

23 Q. Where is it?

24 A. In the handbook on reasonable accommodation.

25 Q. Okay. Is it your understanding that it is part

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1 of your duty to ensure that the people who are
2 making final decisions about reasonable
3 accommodation such as a department chief
4 understand what the rules are as promulgated by
5 the Veterans Association handbook?

6 A. My duty is to ensure they comply with the
7 regulations.

8 Q. I'm sorry. I couldn't hear you.

9 A. My duty is to ensure they comply with the
10 regulations and the policies contained within the
11 handbook.

12 MR. SINDELL: Okay. Would you
13 read back his answer please.

14 THE NOTARY: "My duty is to ensure
15 they comply with the regulations and the
16 policies contained within the handbook."

17 Q. Okay. It says "All the anesthesiologists within
18 the service who work primarily at Wade Park need
19 to be able to participate in the call schedule."

20 Did I read that correctly?

21 A. Yes.

22 Q. Okay. Does that mean that they need to
23 participate in the call schedule at all times
24 during their employment?

25 MS. JOHNSON: Objection. You can

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1 answer.

2 Q. If you know.

3 A. I don't know because I don't know if you're
4 asking me about if they're on vacation for
5 instance.

6 Q. Yeah. Let's say they're on vacation.

7 A. So I would have no knowledge about their
8 practices for vacations.

9 Q. Okay. I'm not asking you if they're not there
10 whether they have to participate in on call
11 because if they're on vacation, I wouldn't expect
12 they would be obligated to work at all.

13 A. Let's hope not.

14 Q. Okay.

15 DR. LISAN: Only the residents.

16 Sorry. Off the record.

17 - - - -

18 (Thereupon, a discussion was had off the
19 record.)

20 - - - -

21 Q. Obviously if somebody is ill, they wouldn't be
22 expected to come in for on call or any other
23 duty; is that correct?

24 A. I don't know.

25 Q. You think that somebody who is ill in bed at home

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1 **would be expected to show up for on-call duty?**

2 A. Only if it was a resident.

3 MR. SINDELL: Let's take a break.

4 - - - -

5 (Thereupon, a recess was had.)

6 - - - -

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AFTERNOON SESSION

(Friday, March 8, 2019, 1:28 p.m.)

- - - -

CONTINUED CROSS-EXAMINATION

OF BRUCE KAFER, RN, MSN

BY MR. SINDELL:

Q. Back on the record.

There are a number of jobs and duties which
are part of any position at the VA, right?
Everyone has integrated duties and jobs and
tasks?

A. Yes.

Q. They are part of, why is the word escaping me.
What is that sheet?

A. Hierarchy? Organizational chart?

Q. No. No.

MS. JOHNSON: Organizational chart
or job description.

Q. That's it. Thank you. Job description.

They're part of job descriptions, okay? But
job descriptions describe positions, don't they?

A. Yes.

Q. And CRNA is a position, correct?

A. Uh-huh.

Q. Is that a yes?

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1 A. Yes.

2 Q. Anesthesiologist would be a position?

3 A. Yes.

4 Q. I don't know what you call your position.

5 A. Registered nurse.

6 Q. Okay. That's a position.

7 And there might be types of slants of jobs in
8 certain kinds of positions that define something
9 a little more specific about it, correct?

10 A. Correct.

11 Q. But, and within positions -- withdrawn.

12 Within job descriptions and positions in job
13 description, some of the activities and duties in
14 a job description are essential functions?

15 A. Correct.

16 Q. But not all of them are essential functions?

17 A. Correct.

18 Q. So in order to determine whether something is an
19 essential function, you would have to distinguish
20 between different tasks within the job
21 description to decide which ones were and which
22 ones were not essential functions?

23 A. Uh-huh.

24 Q. Is that yes?

25 A. You didn't ask a question.

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1 Q. Question mark at the end of that. You want her
2 to read it back?

3 A. Yes. Please read it back.

4 THE NOTARY: "So in order to
5 determine whether something is an essential
6 function, you would have to distinguish
7 between different tasks within the job
8 description to decide which ones were and
9 which ones were not essential functions?"

10 A. Yes.

11 Q. And there are certain prescribed standards in the
12 VA handbook for making that determination as to
13 which tasks within a job description are
14 essential functions and which are not?

15 A. Yes. If you're referring to the reasonable
16 accommodation handbook.

17 Q. Yes, of course I am. Sorry. Thank you.

18 A. Okay.

19 Q. Now, for somebody to express a view, including a
20 department chief, that some task in a job
21 description is an essential function, wouldn't it
22 be necessary for them to know what essential
23 function means under the handbook definition?

24 A. No.

25 Q. They can make up their own definition of

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1 essential function and pick between tasks and
2 decide this one's an essential function and this
3 one isn't, irrespective of the handbook? Is
4 that --

5 A. Potentially.

6 Q. Just a minute. Is that correct? Please answer
7 my question.

8 A. Here is my answer to your question: Potentially
9 they could make up their own definition or they
10 could actually know what the definition of an
11 essential function is and as a subject matter
12 expert, they could provide a citation of what the
13 essential functions are of a position as in the
14 case of Dr. Raphaely.

15 Q. Okay. Now as in the case of Dr. Raphaely, does
16 his job description as an anesthesiologist say
17 that on-call duty is an essential function?
18 Actually say that?

19 A. I don't know.

20 Q. Now I want to be clear about this because I
21 thought you said, and correct me if I'm wrong,
22 that the department chief can choose as an option
23 to use his or her own personal definition of
24 essential function in describing whether a task
25 is or isn't an essential function irrespective of

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1 the definitions in the VA handbook.

2 Is that what you're saying?

3 A. I said that's something they could do. I did not
4 imply or suggest that it would be in alignment
5 with policies or regulations or anything having
6 to do with doing a position professionally.

7 Q. So are you saying it's something they shouldn't
8 do?

9 A. What I am saying in answer to your question is
10 that a service chief, especially Dr. Raphaely,
11 knows what the essential functions of an
12 anesthesiologist are and because of that, she was
13 able to convey that to me.

14 Q. How do you know what she knows?

15 A. I never said that I knew what she knows.

16 Q. You just did.

17 A. Let's --

18 Q. Read back his last answer, please, where he said
19 she knows.

20 Read it back and listen carefully to what you
21 said, Mr. Kafer.

22 A. Okay.

23 THE NOTARY: "What I am saying in
24 answer to your question is that a service
25 chief, especially Dr. Raphaely, knows what

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1 the essential functions of an
2 anesthesiologist are and because of that,
3 she was able to convey that to me."

4 **Q. Now, do you want to leave that answer stand**
5 **exactly as you said it or would you like to**
6 **clarify it?**

7 A. Here is my answer to your question:

8 **Q. Well, what was the last thing you just said? Was**
9 **that an answer?**

10 A. You have to let me answer.

11 **Q. I don't know what question you're answering**
12 **anymore.**

13 A. You just asked me a question and I said "here is
14 my answer."

15 **Q. No, I didn't.**

16 A. You said do you want to let that stand as your
17 answer or do you want to change it and I said
18 here is my answer and then you interrupted me and
19 in the beginning of this process you said that
20 you were not going to interrupt me, so my
21 expectation is that you allow me to answer.

22 **Q. Your expectation should be that in fairness to**
23 **you, I want you to hear the question before you**
24 **answer it again so that you know exactly what the**
25 **question was that you're answering. That's all I**

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1 wanted to do.

2 I thought that just having the answer might
3 not be as clear to you as I would like it to be,
4 so in fairness to you, I want you to hear the
5 question if you're going to answer it again.

6 Now, allow her to read the question so you
7 can hear it again before you answer.

8 A. Now, look --

9 **Q. Please read the question to him.**

10 A. I understand you're informing me of what you
11 want.

12 I was prepared to answer and you interrupted
13 me.

14 **Q. Right. Because I thought you needed --**

15 A. There is no justification for interrupting me.

16 MS. JOHNSON: Okay. Let's, let's
17 just --

18 **Q. You need to talk to him.**

19 Don't tell me what there's justification for.

20 I want you to hear the question.

21 A. Now you're giving me a directive?

22 **Q. Yes. Exactly.**

23 MS. JOHNSON: Let's stop. Let's
24 stop. We're all going to be calm in this
25 room. Okay? We're going to take a deep

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1 breath.

2 I think, I think that you did have
3 a question after the one that he just read
4 an answer to, so I think that that's what
5 he was trying to answer.

6 MR. SINDELL: I'm just trying to
7 be fair to him. That's all.

8 MS. JOHNSON: Yes, and I think
9 that's what he was trying to answer.

10 **Q. So let me have her ask you the question that**
11 **preceded your answer so you can hear the question**
12 **and then answer it. Okay?**

13 A. Okay.

14 **Q. And I think that's just in fairness to you.**

15 **All right. Go read way back there where you**
16 **read the answer, read the question this time.**

17 THE NOTARY: "Now as in the case
18 of Dr. Raphaely, does his job description
19 as an anesthesiologist say that on-call
20 duty is an essential function? Actually
21 say that?"

22 ANSWER: "I don't know."

23 QUESTION: "Now I want to be clear
24 about this because I thought you said, and
25 correct me if I'm wrong, that the

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1 department chief can choose as an option to
2 use his or her own personal definition of
3 essential function in describing whether a
4 task is or isn't an essential function
5 irrespective of the definitions in the VA
6 handbook.

7 "Is that what you're saying?"

8 ANSWER: "I said that's something
9 they could do. I did not imply or suggest
10 that it would be in alignment with policies
11 or regulations or anything having to do
12 with doing a position professionally."

13 QUESTION: "So are you saying it's
14 something they shouldn't do?"

15 ANSWER: "What I am saying in
16 answer to your question is that a service
17 chief, especially Dr. Raphaely, knows what
18 the essential functions of an
19 anesthesiologist are and because of that,
20 she was able to convey that to me."

21 MR. SINDELL: Okay. Now I want
22 you to re-read that last question to the
23 witness.

24 THE NOTARY: "So are you saying
25 it's something they shouldn't do?"

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1 Q. Do you understand it now, the question and the
2 answer that you want to give? Because I'm
3 prepared to let it sit there.

4 A. Are you saying, are you asking me the answer that
5 I gave, do I want to change it?

6 MS. JOHNSON: No. The question
7 that she just read I believe is --

8 Q. Okay. Read his answer then. Give me his answer
9 to that, "so are you saying," give me the answer
10 he gave to that question because I think this is
11 critical here.

12 THE NOTARY: "What I am saying in
13 answer to your question is that a service
14 chief, especially Dr. Raphaely, knows what
15 the essential functions of an
16 anesthesiologist are and because of that,
17 she was able to convey that to me."

18 Q. You know what? I'm going to let that stand just
19 like that.

20 Now you heard her read back your answer,
21 didn't you?

22 A. Yes.

23 Q. Okay. When you said, "She knows what the
24 essential functions of an anesthesiologist are,"
25 you remember that?

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1 A. Yes.

2 Q. When Dr. Raphaely says -- with withdrawn.

3 When you said that Dr. Raphaely knows what
4 the essential functions of an anesthesiologist
5 are, you're referring to the position of an
6 anesthesiologist; is that correct?

7 A. Yes.

8 Q. Thank you. Now, I might as well just go right
9 into this. This will be Exhibit 11.

10 - - - -

11 (Thereupon, Plaintiff's Exhibit 11, 11/27/13
12 VA Handbook 5975.1 "Essential Functions" was
13 marked for purposes of identification.)

14 - - - -

15 Q. Let me ask you this question: In your view, does
16 the number of other employees available to
17 perform the function or among whom the
18 performance of the function can be distributed
19 factor into whether it's an essential function?

20 A. Yes.

21 Q. Does the degree of expertise or skill required to
22 perform the function factor into an essential
23 function?

24 A. Yes.

25 Q. Does a written job description before advertising

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1 or interviewing applicants for the job factor
2 into what an essential function is?

3 A. Sometimes.

4 Q. Does the amount of time actually spent on the job
5 performing the function impact whether or not
6 it's an essential function?

7 A. Does the amount of time spent performing on the
8 job? Can you read that back, please?

9 Q. Sure. Does the amount of time actually spent on
10 the job performing the function factor into
11 whether or not it's an essential function?

12 A. It can.

13 Q. Does the consequences of not requiring the
14 incumbent to perform the function factor into it?

15 A. It can.

16 Q. Does the terms of the, any collective bargaining
17 agreement, it's really not applicable here, but
18 does that factor into it, if you know?

19 A. I don't know.

20 Q. Does the work experience of past incumbents in
21 the job factor into whether it's an essential
22 function?

23 A. I am uncertain.

24 Q. Does the current work experience of the incumbent
25 in similar jobs factor into whether it's an

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1 essential function?

2 A. I don't know.

3 Q. Okay. Now I'm going to -- I'll give you this,
4 so -- all I did, by the way was just read what it
5 said. And I'd like you to review it.

6 This is Exhibit 11.

7 A. Okay. I've reviewed the document.

8 Q. I'd like you to, let me just ask you to your
9 knowledge is this the handbook definition of the
10 VA of an essential function?

11 A. Yes.

12 Q. Okay?

13 A. It also states what is considered in determining
14 whether a job function is essential.

15 Q. Yes, it does. I'm not excluding anything.

16 A. Right.

17 Q. All right. Now let's take a look at the
18 paragraph above all those bullet points. You see
19 it?

20 A. Yes.

21 Q. I'd like you to look at the, looks like the
22 second last sentence. It says: "If a function
23 is listed in the position description as an
24 essential function, but is not performed by the
25 incumbent or takes only a few hours per week, it

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1 is not usually considered 'essential' for
2 purposes of accommodation."

3 Did I read that correctly?

4 A. Yes, you did.

5 Q. Do you take any issue or disagreement with that
6 sentence?

7 A. No.

8 Q. Would you agree -- withdrawn.

9 Do you have any idea how many hours on call
10 takes in terms of the weekly hours of a full-time
11 anesthesiologist?

12 A. In general or specifically related to the
13 Cleveland VA's anesthesiology service or is this
14 anesthesiologists in general or on average?

15 Q. I'm sorry I didn't make that clear.

16 Let me repeat it and I do mean the Cleveland
17 VA; so at the Cleveland VA in the department of
18 anesthesiology at the Cleveland VA, at the time
19 of December 2016 and the first part of 2017.
20 Okay?

21 Do you know how many hours per week it takes
22 a full-time anesthesiologist to do on-call duty?

23 A. No.

24 Q. Do you think that the knowledge of that would be
25 important in determining whether or not a

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1 function is essential for the position of
2 anesthesiologist?

3 MS. JOHNSON: You can answer.

4 A. No. And here is the rest of my answer:

5 **Q. I didn't ask you why. I just --**

6 A. You're interrupting me now and I haven't finished
7 answering. Remember what you said: No
8 interrupting.

9 **Q. Yes. But --**

10 A. There's no buts. Those were the rules.

11 **Q. No, they're not the rules.**

12 A. You established them in the beginning. You
13 said --

14 MS. JOHNSON: Let's stop.

15 MR. SINDELL: I'm going to ask
16 counsel this and I'm not directing it to
17 the witness, okay?

18 The witness has a right to give a
19 full answer and I fully agree with that.
20 Let me finish.

21 MS. JOHNSON: I will.

22 MR. SINDELL: Plus -- however, he
23 does not have a right to just make answers
24 that are not responsive to a yes or no
25 question.

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1 MS. JOHNSON: Well, I think that
2 he is allowed to answer. If you don't
3 think it's relevant, you don't have to deal
4 with it but he did answer the question no
5 and he apparently --

6 MR. SINDELL: He can explain it.

7 MS. JOHNSON: And he apparently
8 wants to explain that a little bit.

9 MR. SINDELL: Okay.

10 MS. JOHNSON: So he's permitted to
11 do that.

12 **Q. Okay. Now why don't you explain your answer**
13 **then. Go ahead.**

14 **A. Please repeat the question.**

15 THE NOTARY: "Do you think that
16 the knowledge of that would be important in
17 determining whether or not a function is
18 essential for the position of
19 anesthesiologist?"

20 **A. My knowledge of -- wait. I'm lost.**

21 THE NOTARY: "Do you know how many
22 hours per week it takes a full-time
23 anesthesiologist to do on-call duty?"

24 **ANSWER: "No."**

25 **QUESTION: "Do you think that the**

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1 knowledge of that would be important in
2 determining whether or not a function is
3 essential for the position of
4 anesthesiologist?"

5 A. The knowledge of the number of hours -- is this
6 question, are you asking if I had that knowledge
7 or if Dr. Raphaely had that knowledge?

8 **Q. The question I think is clear.**

9 A. Are you unable to answer my question? I need to
10 know --

11 MS. JOHNSON: You're not supposed
12 to be asking questions.

13 A. Okay. Sorry.

14 MS. JOHNSON: So could you read
15 back the question again.

16 MR. SINDELL: Sure. Let's keep
17 reading it back.

18 A. Like whose knowledge are we referring to is what
19 I need to know.

20 MS. JOHNSON: I think it's yours.

21 A. My knowledge? If I am aware of how many hours?

22 **Q. No. No. Listen to the question.**

23 MS. JOHNSON: Listen to the
24 question.

25 **Q. And then I think it's very clear. I stand on**

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1 that question as being quite clear.

2 A. So it's asking about my knowledge?

3 MS. JOHNSON: I believe so. So
4 listen to the question.

5 MR. SINDELL: Did you take her
6 statement down just now?

7 THE NOTARY: Yes.

8 MR. SINDELL: Because I don't know
9 that that's true, but read the question.

10 MS. JOHNSON: Well, let's read the
11 question.

12 THE NOTARY: "Let me repeat it and
13 I do mean the Cleveland VA; so at the
14 Cleveland VA in the department of
15 anesthesiology at the Cleveland VA, at the
16 time of December 2016 and the first part of
17 2017. Okay?

18 "Do you know how many hours per
19 week it takes a full-time anesthesiologist
20 to do on-call duty?"

21 ANSWER: "No."

22 QUESTION: "Do you think that the
23 knowledge of that would be important in
24 determining whether or not a function is
25 essential for the position of

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1 anesthesiologist?"

2 A. It is not necessarily relevant to determine the
3 essential functions of an anesthesiologist
4 because I can be informed by subject matter
5 experts like Dr. Raphaely or the human resources
6 person, Jelena who is referenced in some of the
7 documents.

8 Q. Okay. Fine.

9 Now, do you know what considerations
10 Dr. Raphaely took into account when she told you
11 that on-call duty is an essential function of an
12 anesthesiologist's job at the Cleveland VA?

13 A. No, I do not know what considerations
14 Dr. Raphaely thought about or was on her mind
15 prior to informing me that on call was an
16 essential function.

17 Q. Did you have any discussions with her about what
18 the VA regulations, policies and handbook said
19 about what an essential function of the position
20 is --

21 A. I don't recall.

22 Q. -- in connection with Ronald Lisan's reasonable
23 accommodation request?

24 A. I have no recollection of any such conversations.

25 Q. Okay. That's fine. This will be Exhibit 12.

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(Thereupon, Plaintiff's Exhibit 12, 11/27/13
VA Handbook 5975.1 "Denial of Reasonable
Accommodation Requests" was marked for
purposes of identification.)

- - - -

Q. This is just going to be fairly quick.
Here's Exhibit 12. I'm just going to ask him
to identify it. Okay?
Can you identify Exhibit 12? Is it from the
handbook?
A. It looks to be Section 21 from the handbook on
reasonable accommodation.
Q. It looks familiar to you?
A. Yes.
Q. Okay. Thank you. That's all. I'm not asking
you any questions about it.
A. Okay.

- - - -

(Thereupon, Plaintiff's Exhibit 13, 11/27/13
VA Handbook 5975.1 "Interactive Process" was
marked for purposes of identification.)

- - - -

Q. This is just ID only. I'm not going to give you
the one I marked for myself.

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1 DR. LISAN: This is 13?

2 Q. 13.

3 Do you have 13 in front of you?

4 A. Yes.

5 Q. Are you able to identify that as a section on the
6 interactive process from the VA handbook?

7 A. Yes.

8 Q. Thank you.

9 I'm going back to Exhibit 10. Can you pull
10 that out? There you go.

11 We covered a lot of this but I'm going to
12 read another sentence in the middle of it.

13 "All the anesthesiologists within the service
14 who work primarily at Wade Park need to be able
15 to participate in the call schedule."

16 Did I read that correctly?

17 A. Yes.

18 Q. Does it, do you understand that to mean that all
19 the anesthesiologists within the service who work
20 primarily at Wade Park need to be able to
21 participate in the call schedule on every single
22 day that they work?

23 A. I understand it to mean they participate, they
24 need to be able to participate in the call
25 schedule because it is an essential function.

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1 Q. Yes, but even if it's an essential function, does
2 it mean they have to be able to do it every
3 single day they're at work?

4 A. Oh. I don't know if they need to be able to do
5 it every single day. My understanding was it is
6 rotated.

7 Q. When Ron was on leave for a period of many weeks
8 if not months, other people covered on call; is
9 that correct?

10 MS. JOHNSON: Objection. You may
11 answer.

12 Q. Do you know that? They kept doing on call?

13 A. It would be normal if someone was on a legitimate
14 leave status that someone else would have to
15 cover.

16 Q. Right. You don't stop doing on call because
17 somebody's on leave?

18 A. Right. Other people would have to cover the
19 on-call duties.

20 Q. Or else you would have to add or hire somebody
21 else to fill in for the person who's away, right?

22 A. Correct.

23 Q. Do you know if it was necessary when Ron was away
24 to hire or add any other anesthesiologists to the
25 anesthesiology department at the VA in Cleveland

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1 to cover on-call duty?

2 A. I don't know if it was necessary but I would
3 assume it would be necessary because I know that
4 someone has to cover.

5 Q. I'm asking you what you know.

6 A. Okay.

7 Q. Do you know or don't you know?

8 A. Do I know if --

9 Q. I don't want you to assume anything.

10 Do you know or don't you know whether anybody
11 was added to the anesthesiology staff to cover
12 the on-call duty at the VA in the absence of
13 Ronald Lisan for at least several weeks?

14 A. I do not know if anybody was added to the staff.

15 Q. Do you know if anybody was brought in on some
16 temporary basis other than the existing staff to
17 do on-call duty at the VA --

18 A. I do not know.

19 Q. -- anesthesiology department during Ronald
20 Lisan's leave of absence in 2016?

21 A. I don't know.

22 Q. That's fine. Thank you.

23 Now let's go on to the next. Would it
24 surprise you to know that nobody was added?

25 MS. JOHNSON: Objection. You may

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1 answer.

2 Q. Withdrawn. I'm going to withdraw that question.

3 I'm sorry.

4 It says in the next sentence, "We do have one
5 position for a full-time, no call
6 anesthesiologist that works exclusively at the
7 ASC but that position is currently filled."

8 Did I read that correctly?

9 A. Yes.

10 Q. Can you tell me what ASC means?

11 A. Yes.

12 Q. What is it?

13 A. Ambulatory surgery center.

14 Q. So do you understand this sentence to mean that
15 Dr. Raphaely is identifying a position, even
16 though it was filled, for a full-time
17 anesthesiologist that does not require any
18 on-call duty?

19 A. Yes; and she indicated it was with the ambulatory
20 surgery center.

21 Q. Yes. And that's part of the Cleveland VA, isn't
22 it?

23 A. Yes, it is. It is a unit that functions during
24 the daytime and then they have no patients
25 staying overnight as compared with the inpatient

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1 anesthesiology.

2 Q. In the context of this email, can you explain to
3 me your understanding of why she would be raising
4 the matter of a position for a full-time
5 anesthesiologist that does not require on-call
6 duty?

7 MS. JOHNSON: Objection. You may
8 answer.

9 A. My understanding is she is informing me by
10 providing an overview of what is essential and
11 what they have. This would be typical of the
12 types of communications I receive in the
13 processing of RA requests.

14 Q. Okay. But she's, so I understand your answer to
15 my question, she's informing you of a position
16 that does not require any on-call duty; is that
17 correct?

18 A. Yes. She referenced one position that had no
19 on-call duties.

20 Q. Right. Now, does that suggest to you that her
21 understanding of Dr. Lisan's reasonable
22 accommodation request was to have a position as
23 an anesthesiologist which required no on-call
24 duty whatsoever?

25 A. Can you read that back.

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1 THE NOTARY: "Now, does that
2 suggest to you that her understanding of
3 Dr. Lisan's reasonable accommodation
4 request was to have a position as an
5 anesthesiologist which required no on-call
6 duty whatsoever?"

7 MS. JOHNSON: Objection. You may
8 answer.

9 A. No.

10 **Q. How do you know that?**

11 MS. JOHNSON: Same objection.

12 A. How do I know that it didn't suggest it to me?

13 **Q. Yes. Why doesn't that suggest to you that that's**
14 **what she understood the accommodation or claimed**
15 **to understand the accommodation that Dr. Lisan**
16 **was seeking no on-call duty in his**
17 **anesthesiologist position?**

18 A. Okay. Here's my answer to your question:

19 It is clear from this communication that she
20 is informing me of the essential functions of an
21 anesthesiologist like Dr. Lisan and those types
22 of positions and she's contrasting it with one
23 ambulatory care position where there is one
24 anesthesiologist who does not have on-call
25 duties; therefore I was able to conclude from

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1 this that Dr. Lisan had on-call duties as an
2 essential function; so because this message was
3 sent on December 19th, 2016, this was prior to
4 any informative or required medical documentation
5 I would have needed to move forward in the
6 reasonable accommodation process.

7 So this information was helpful as the
8 reasonable accommodation coordinator when you
9 begin to put together all the pieces of what's
10 needed to proceed.

11 **Q. How is this information helpful to you to do that**
12 **right here, this information about**
13 **anesthesiologist job with no on-call duty? How**
14 **is it helpful?**

15 A. It lets me know that there is a position that has
16 no on-call duty but it's filled because in some
17 cases when you have a reasonable accommodation
18 request, you can move staff around and then, but
19 since that was filled, it did not look like
20 anybody could be moved into that position because
21 it was filled and also it informs me what the
22 essential functions are.

23 **Q. She already told you what the essential function**
24 **was regarding on call, didn't she? Very clearly?**
25 **Taking call is an essential function of his**

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1 position. That's as clear as a bell, isn't it?

2 A. Yes.

3 Q. So adding that there's a non -- a no call
4 anesthesiology position doesn't help inform you
5 that on call is an essential function for his
6 anesthesiology position, does it? She's already
7 informed you of that?

8 A. What it does is inform me about aspects that are
9 relevant to this reasonable accommodation
10 process.

11 Q. Okay. Let me ask you a different question.
12 Let's just -- withdrawn.

13 The last sentence reads, and I'll read it, as
14 follows -- not last sentence. Looks like second
15 last sentence.

16 "Therefore, am I would request that if
17 Dr. Lisan is indeed unable to perform the
18 essential functions of his position, you could
19 assist him in alternative reasonable
20 accommodations."

21 Did I read that correctly?

22 A. Yes.

23 Q. The alternative reasonable accommodations would
24 appear to be an anesthesiologist position with no
25 on-call duties from this email; is that correct?

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1 A. I have no way of knowing what she means by
2 alternative reasonable accommodations because
3 that's not a term that I utilize or would be
4 utilized in this process, especially at this
5 early stage of processing a request so that
6 sentence, while it references essential functions
7 and it says you could assist him, those are the
8 key points for me; so when I look at that, it is
9 not very informative.

10 **Q. Did you ask her what she meant at any time before**
11 **the determination of the reasonable accommodation**
12 **request of Dr. Lisan was made, what Dr. Raphaely**
13 **meant by alternative reasonable accommodations?**

14 A. No.

15 **Q. Why not?**

16 A. Because it would be irrelevant.

17 **Q. It's irrelevant?**

18 A. It would be irrelevant at this juncture on
19 December 19th.

20 **Q. Okay.**

21 A. Or upon my reading this, if I read it like the
22 next day.

23 **Q. Did you ever ask her before the reasonable**
24 **accommodation was turned down?**

25 A. Did I ever ask her if there was a, what she

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1 meant?

2 **Q. What alternate reasonable accommodations were?**

3 A. I have no recollection if I actually asked her
4 that question but I doubt it.

5 **Q. Now, if there, if he was unable to perform, let's**
6 **assume this: If Dr. Lisan -- withdrawn.**

7 If Dr. Lisan were unable to perform his
8 regular anesthesiologist job because he couldn't
9 do the essential function of the position, which
10 is, includes on-call duty according to
11 Dr. Raphaely, and there was no position for an
12 anesthesiologist in the VA that was open for him
13 to have an anesthesiology job without on-call
14 duty, what would be the consequence of that
15 circumstance?

16 A. Here is my answer to your question about if
17 Dr. Lisan was unable to perform his essential
18 functions: And I recognize that this was not the
19 case, so my understanding is you're asking me to
20 speculate what would occur.

21 **Q. Well, let's take it this way: I don't want you**
22 **to speculate.**

23 If there wasn't a job for a full-time
24 anesthesiologist with on-call duty and there was
25 no job without on-call duty that was available,

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1 he wouldn't be able to have a job as an
2 anesthesiologist at that time at the Cleveland
3 VA, correct?

4 A. Again, you're asking me one of these if
5 questions.

6 Q. No, it's -- sorry. I don't think it's an if
7 question. I asked you to assume exactly what --
8 withdrawn.

9 I asked you to assume that there was no
10 anesthesiology position with on-call duty
11 available to him and I asked you to assume there
12 was no anesthesiology job without on-call duty
13 available to him. Now those are two very clear
14 assumptions.

15 If that's the case, he's out of there, isn't
16 he? Without a job as an anesthesiologist at the
17 VA at that time, correct?

18 A. You're asking to make, me to make two
19 assumptions --

20 Q. Yes, sir.

21 A. -- that are unrelated to his case.

22 Q. I'm asking you to make two assumptions period.

23 Now, can you make them or not? Sorry.
24 Withdrawn. Let me say it again. I don't think
25 these assumptions are things that you're

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1 incapable of making.

2 Is it a fact that if he couldn't do on-call
3 duty as an anesthesiologist, he couldn't take a
4 job with on-call duty as an anesthesiologist,
5 that's true, isn't it? Isn't that just simply
6 true?

7 A. Here is my answer:

8 Q. How about yes or no?

9 MS. JOHNSON: He can answer how he
10 sees fit, Steve.

11 MR. SINDELL: No he can't.

12 MS. JOHNSON: And then if he
13 can't --

14 Q. I would like --

15 MS. JOHNSON: Steve --

16 Q. Just a moment. I would like a yes or no answer
17 if possible to this question.

18 You can explain anything else you want to
19 about it after you answer my question. Okay?
20 You can say anything you want but I want you to
21 answer my question.

22 MS. JOHNSON: I object.

23 A. Tell me when I should answer.

24 MS. JOHNSON: I object to this
25 tone and I think that we need to step back

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1 a little bit.

2 MR. SINDELL: All right. Fine.

3 MS. JOHNSON: Steve, he, you may
4 want a yes or no answer --

5 MR. SINDELL: Well, he doesn't
6 have to give me a yes or no answer if he
7 wants to talk around it but I think it's a
8 yes or no question, and let me be real
9 clear about it.

10 He does have to give a yes or no
11 answer, counsel, to a question that calls
12 for a yes or no answer or explain to me why
13 he can't answer it yes or no.

14 And then if --

15 MS. JOHNSON: Yes, and I think he
16 was trying to do that.

17 MR. SINDELL: Let me finish.

18 And if I think that the question
19 is clear as a bell and that it's just --

20 MS. JOHNSON: Then you may follow
21 up.

22 MR. SINDELL: Just let me finish,
23 please.

24 MS. JOHNSON: You have not let me
25 finish at all.

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1 MR. SINDELL: I'm talking right
2 now and then I'll let you talk. Okay?

3 Let me finish.

4 I want the court to understand at
5 this point in the record that if I am
6 correct that this is a simple question that
7 can be answered yes or no and he can
8 explain anything else he wants about his
9 answer, I am going to make a motion, which
10 I hate to do, to have him come back and
11 answer the question for failure to give a
12 straight answer and for being evasive and I
13 believe that by telling me here that that's
14 not appropriate or that he doesn't have to
15 give a yes or no answer to an obvious
16 question, that you are participating in his
17 doing that.

18 MS. JOHNSON: No.

19 MR. SINDELL: Now, that's what I
20 say.

21 Say anything you want now for the
22 record.

23 MS. JOHNSON: No, you did not, A,
24 let me finish my objection and discuss it
25 with you.

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1 MR. SINDELL: Sure.

2 MS. JOHNSON: Okay?

3 MR. SINDELL: Sure.

4 MS. JOHNSON: B, I am not
5 participating in any sort of coverup and I
6 resent that accusation.

7 MR. SINDELL: I didn't use the
8 word coverup.

9 MS. JOHNSON: Or evasion or
10 whatever you were saying.

11 I resent that and that is not true
12 and you know it.

13 MR. SINDELL: I don't know
14 anything.

15 MS. JOHNSON: I was telling you
16 that while you may think it is a yes or no
17 question, sometimes it isn't a yes or no
18 question and if the witness needs to answer
19 it in a different way than you think it
20 should be answered, he should be allowed to
21 do that and then you are allowed to follow
22 up on the question --

23 MR. SINDELL: Yes. I know that.

24 MS. JOHNSON: -- like you've been
25 doing.

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1 MR. SINDELL: I agree with that.

2 MS. JOHNSON: So I think I'm
3 objecting to the tone because I think we're
4 getting into --

5 MR. SINDELL: Okay.

6 MS. JOHNSON: -- badgering
7 territory.

8 I'm not done yet.

9 And I would like to take a little
10 brief break --

11 MR. SINDELL: No. I don't want to
12 take a break now because I don't want you
13 talking to this witness at this point.

14 MS. JOHNSON: I was going to talk
15 to this witness and tell him to calm down.
16 Okay?

17 MR. SINDELL: Okay. I think he
18 heard you and so did I and I'm calmed down
19 and I think he is, too.

20 Now let's go on. Okay?

21 BY MR. SINDELL:

22 Q. I'm asking you to assume hypothetically that on
23 or about December 19, 2016 Dr. Lisan was unable
24 to do on-call duty for a short period of time and
25 therefore was precluded from taking a position as

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1 an anesthesiologist at the VA which required
2 on-call duty.

3 My first question is can you simply just
4 assume that?

5 A. No. And the reason I cannot assume that is
6 because there is no evidence of that.

7 MR. SINDELL: Is that a reason for
8 him to say no, he can't assume it? Is that
9 really a reason for him to do that?

10 MS. JOHNSON: Are you asking me?

11 MR. SINDELL: I asked him to
12 assume that hypothetically.

13 MS. JOHNSON: I think you may
14 answer the question yes or no whether you
15 can assume that. I think you can do -- I
16 think he --

17 MR. SINDELL: Oh, he can say no, I
18 can't assume that? That's his answer?

19 MS. JOHNSON: I think he --

20 MR. SINDELL: You're going to
21 allow him to do that?

22 MS. JOHNSON: No. You didn't let
23 me finish, Steve.

24 MR. SINDELL: Sure. Finish.

25 MS. JOHNSON: You need to answer

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1 the question.

2 You need to ask the question.

3 MR. SINDELL: I just did.

4 MS. JOHNSON: And I think we all
5 need to answer the question and move on,
6 because we're getting way out of line here.

7 MR. SINDELL: Okay. Read it back
8 to him, please, and --

9 MS. JOHNSON: And you again didn't
10 let me finish.

11 MR. SINDELL: Oh, I'm sorry. I
12 thought you were.

13 MS. JOHNSON: No, I was not
14 finished.

15 I'm asking you whether we need to
16 just take a break and calm down because I
17 think everyone's getting a little angry and
18 I think you want to have him answer the
19 question first; is that correct?

20 MR. SINDELL: What I want him to
21 do is do what every witness and every
22 lawyer would tell him to do, which is to
23 assume something that may not be factually
24 the case as it occurred; but hypothetically
25 if he is unable to take a position with

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1 on-call duty, okay? Can he assume that to
2 have been the case for purposes of my
3 question. And there is no way --

4 MS. JOHNSON: And I would --

5 MR. SINDELL: -- any witness can
6 say no, I won't assume it because it didn't
7 happen.

8 MS. JOHNSON: Well --

9 MR. SINDELL: And any attorney in
10 my opinion would have to tell him that.

11 MS. JOHNSON: Now, Steve --

12 MR. SINDELL: Now, if you want to
13 take a break and tell him that, I'll step
14 out and you can take a break. Okay? Tell
15 him. Now you got a break. Tell him.

16 MS. JOHNSON: Okay.

17 MR. SINDELL: I'm not going to
18 take very long -- you got to step out,
19 too -- and you tell him but I don't think
20 that should take very long. I'll knock on
21 the door in a couple minutes. How's that?
22 And we're going to be here all day or we
23 may have to simply adjourn the deposition
24 right now if we're going to keep doing this
25 because that's not proper in my opinion.

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1 In my opinion, he has to at least give me
2 the benefit of assuming something like
3 that.

4 MS. JOHNSON: Are we now off the
5 record?

6 - - - -

7 (Thereupon, a recess was had.)

8 - - - -

9 BY MR. SINDELL:

10 Q. If we assume hypothetically that Dr. Lisan could
11 not take his regular anesthesiologist position at
12 the Cleveland VA because it had as an essential
13 function on-call duty and we further assume that
14 the position of anesthesiologist without on-call
15 duty -- no call duty was filled and not available
16 and there were no other such no call duty
17 anesthesiology positions available, what his
18 alternative would be would be to have to leave
19 the VA and find employment elsewhere.

20 Wouldn't you agree with that?

21 A. No.

22 Q. Okay.

23 A. Hypothetically if he was unable to perform an
24 essential function like on-call duty, he may need
25 to use an appropriate leave status because if he

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1 was unable to perform an essential function like
2 on call, he may hypothetically have been unable
3 to perform other essential functions so we don't
4 know in the hypothetical scenario if he had leave
5 time, where we were at, what the rest of his
6 record was but it would be unlikely that he would
7 have to leave the VA, especially if it was a
8 temporary condition.

9 **Q. Let me ask you this: If we just talk about**
10 **anesthesiology positions in the anesthesia**
11 **department and not some other position, okay?**

12 **Would you agree that he would not be able to at**
13 **that time assume an anesthesiology position with**
14 **or without on-call duty under those assumptions?**

15 A. If in this hypothetical scenario he was unable to
16 perform an essential function, then he would have
17 to take an appropriate leave status.

18 **Q. Okay. What if he didn't have any leave?**

19 A. He could request additional leave and then a
20 determination would be made by management as to
21 whether or not it would be granted.

22 **Q. And if it wasn't granted, he would have to leave**
23 **the VA?**

24 A. Potentially.

25 - - - -

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1 (Thereupon, Plaintiff's Exhibit 14, 12/19/16
2 Kafer VA Reasonable Accommodation Request
3 email to Lisan, was marked for purposes of
4 identification.)

5 - - - -

6 Q. Have you had a chance to read 14?

7 A. Yes.

8 Q. Okay. That's Exhibit 14.

9 You write in this email dated also the 19th
10 of December at 1:50 p.m. to Ronald Lisan --
11 that's the only person you're writing to here it
12 looks like; is that correct?

13 A. Correct.

14 Q. "I have attached instructions for your health
15 provider and also the form that is needed."

16 So I assume that form was attached? You've
17 got to use words.

18 MS. JOHNSON: Say yes or no.

19 A. Oh, yes.

20 Q. Okay. "I understand at this juncture you are
21 requesting to be taken off the," quote, "on
22 call," end quote, "schedule. However the
23 duration for this is unknown by me."

24 So let me stop right there.

25 How did you understand that he was requesting

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1 to be taken off the on-call schedule?

2 A. I don't recall exactly how I understood he was to
3 be taken off the on-call schedule; however, when
4 I look at the previous Exhibit 10, it references
5 at 10:50 in the morning, and Exhibit 14 is at
6 1:50 in the afternoon, Dr. Raphaely provides
7 descriptions about this request by Dr. Lisan so I
8 believe, as I look at these documents, that is
9 how I was informed that he was requesting to be
10 taken off the on-call schedule hence my question
11 to him in conveying what my understanding was at
12 that point that he was requesting to be taken off
13 the on-call schedule.

14 Q. Okay. So to try to restate and summarize what I
15 think you said, the reason you wrote at 1:50 p.m.
16 on Monday, December 19, 2016 to Ron Lisan that he
17 was requesting to be taken off the on-call
18 schedule is because of Exhibit 10 which you
19 received, what, a couple hours or so, three hours
20 earlier actually from Dr. Raphaely that indicated
21 that to you?

22 A. Yes.

23 Q. And where, let's look at Exhibit 10.

24 Will you please tell me where in Exhibit 10
25 there is anything that led you to believe that he

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1 wished to be taken off the 'on call' schedule?

2 A. In the sentence, in the second sentence in
3 Exhibit 10 it says, "Dr. Lisan is a long-standing
4 member of the anesthesia department and due to
5 changes in his health, he is stating he is unable
6 to participate in call."

7 Q. Okay. So you're basing your conclusion on the
8 statement of Dr. Raphaely that Dr. Lisan is
9 stating he's unable to participate in call?

10 A. Correct.

11 Q. Is that correct?

12 A. Correct.

13 Q. Did you ever ask Dr. Lisan about what he was
14 stating he was able or unable to participate in?

15 A. Yes.

16 Q. When did you ask him that?

17 A. In the second sentence of Exhibit 14 where I
18 wrote, "I understand at this juncture you are
19 requesting to be taken off the on-call schedule."

20 Q. Okay. That's a question? To quote you? That's
21 a question?

22 A. Yes, it is a question.

23 Q. So --

24 A. Are you referring to the grammar and the absence
25 of my question mark?

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1 Q. Just like you are with me.

2 That was a joke. So let's not play any
3 games. I'll call that an inquiry. Okay? That
4 you understood that he was requesting to be taken
5 off the on-call schedule?

6 A. Yes.

7 Q. Okay. So what you're telling me is that you were
8 open to hearing from him; is that correct?

9 A. Yes, and I'm aware subsequent to this he provided
10 medical documentation.

11 Q. I understand that but let me just go on.

12 A. Okay.

13 Q. You say, "However, the duration for this is
14 unknown by me."

15 Why did you write that?

16 A. Because --

17 Q. What does the duration make any difference for?

18 A. Because the duration is always relevant.

19 Q. Why?

20 A. Because you need to know how long is this
21 request? Is this --

22 Q. Why?

23 A. Because it may factor into whether or not an
24 accommodation can be provided.

25 Q. And it may factor into whether or not on call is

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1 an essential function for the position as listed
2 in the handbook as well if the duration is very
3 short, correct?

4 A. Possibly.

5 Q. Thank you. Now, you also say in the last
6 sentence, "Please advise me, feel free to call me
7 if you have any questions."

8 A. Yes, it says that.

9 Q. And you meant that, didn't you?

10 A. Yes.

11 Q. You didn't mind if he called you on the phone?

12 A. No.

13 Q. You didn't mind if he wanted to meet with you in
14 person?

15 A. No.

16 - - - -

17 (Thereupon, Plaintiff's Exhibit 15, 12/20/16
18 Kafer "Re: VA Reasonable Accommodation
19 Request" email to Lisan, was marked for
20 purposes of identification.)

21 - - - -

22 Q. Okay. I'd like you to look at Exhibit 15.

23 MS. JOHNSON: Off the record.

24 - - - -

25 (Thereupon, a discussion was had off the

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1 record.)

2 - - - -

3 Q. Have you had a chance to read 15?

4 A. Yes.

5 Q. Okay. This is on December 20th, the next day,
6 from you to Dr. Lisan; is that correct,
7 Mr. Kafer?

8 A. Yes, that is correct.

9 Q. And he is the only recipient, right?

10 A. Yes.

11 Q. All right. And sent toward the end of the day at
12 4:21 p.m., right?

13 A. Yes.

14 Q. Dr. Lisan -- I'm going to read it and then ask
15 questions.

16 "Dr. Lisan, do you have time to meet tomorrow
17 morning individually in person with me?"

18 I assume you wanted to meet with him in
19 person, correct?

20 A. I was asking if he had time to meet.

21 Q. Well, why were you asking him if you didn't want
22 to meet with him?

23 A. I don't recall at the time but based on this
24 document, it appears I was interested in finding
25 this out.

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1 Q. Okay. So --

2 A. Sometimes people can meet, sometimes they can't,
3 so sometimes you have to do everything by email.

4 Q. But you wanted to speak with him, did you not?

5 A. I wanted to communicate with him and I was aware
6 there were different modalities of communication.

7 Q. Okay. I understand. You can communicate by
8 telephone?

9 A. Correct.

10 Q. You can communicate in writing?

11 A. Correct.

12 Q. You can communicate in person?

13 A. Correct.

14 Q. Usually -- withdrawn.

15 Would you agree with me that when you say
16 "time to meet," you're using that in the face to
17 face sense?

18 A. Yes.

19 Q. So you were certainly open to meeting with him
20 face to face?

21 A. Yes.

22 Q. And the reason you wrote "do you have time to
23 meet" is because you thought it was a good idea
24 for him to meet with you, right?

25 A. It is important for me to know if an individual

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1 is available to meet because like Dr. Lisan is an
2 anesthesiologist and he's busy so I needed to
3 acquire that information to know whether or not I
4 was going to be able to meet with him or could I
5 get everything I needed electronically.

6 **Q. But you wanted to meet with him or communicate**
7 **with him, didn't you? That's why you asked him**
8 **if he had time?**

9 A. Probably, yeah.

10 **Q. Probably?**

11 A. Well, it says here "do you have time to meet;" so
12 clearly I'm asking about does he have time to
13 meet.

14 **Q. And that meant you wanted to meet with him; is**
15 **that correct?**

16 MS. JOHNSON: I'm going to object.

17 I think this has been asked and answered.

18 You may answer.

19 **Q. All right. Fine. If he wants to do that, it's**
20 **fine.**

21 "I can appreciate the sincerity of your
22 assertions and thank you for making them."

23 What assertions were you referring to that
24 Dr. Lisan had made?

25 A. I was referring to whatever assertions he had

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1 made. I don't recall the exact assertions.

2 **Q. Do you recall any of them?**

3 A. Not exactly, no.

4 **Q. Do you recall them generally?**

5 A. In the most general sense, I could characterize
6 them if you wanted me to.

7 **Q. Characterize them the best as you can from your**
8 **recollection or if you can't, then don't guess.**

9 A. Dr. Lisan was conveying that there was
10 justification for him not to do call but in his
11 conveyance of these assertions he also conveyed
12 that he was performing on call and indicated or
13 suggested that it was his preference not to do
14 it.

15 **Q. Okay. How did he indicate that to you?**

16 A. In writing.

17 **Q. Okay. Do you have anything in writing where he**
18 **actually said something like that?**

19 A. With me right now?

20 **Q. No. In your possession or anywhere?**

21 A. I believe I do.

22 MR. SINDELL: Okay. Please mark
23 that. I obviously would like to see that.

24 BY MR. SINDELL:

25 **Q. It says, "However, I do think it is important you**

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1 understand the VA Reasonable Accommodation
2 process and what is involved in this concept of
3 essential functions."

4 Why did he need to understand the concept of
5 essential functions from you?

6 A. Because when an RA requester -- when I say RA,
7 I'm referring to reasonable accommodation --
8 understands the process, they're more readily
9 able to participate in the process, which
10 expedites matters.

11 Q. Okay. Had he asked you for an explanation of the
12 concept of essential functions --

13 A. I don't recall him asking.

14 Q. I didn't say he did, so you need to let me
15 finish?

16 A. Did you ask me a question?

17 Q. I haven't finished the question. That's the
18 problem.

19 A. Please continue.

20 Q. Well, how about I start again, okay?

21 If you had had the opportunity to explain to
22 him the concept of essential functions as you
23 used that phrase in this email Exhibit 15, what
24 would you have told him about the concept of
25 essential functions?

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1 A. As I recall, I explained in an email to him these
2 concepts, the concept of essential functions as
3 well as other aspects of the reasonable
4 accommodation process that essential functions
5 cannot be removed in an accommodation.

6 **Q. So you say you actually did explain it?**

7 A. In writing.

8 **Q. In writing.**

9 MR. SINDELL: And so I don't have
10 that either, so once again, I would like a
11 copy of that.

12 Are we going to get these
13 productions in time for me to review them?

14 MS. JOHNSON: What do you mean "in
15 time for me to review them"?

16 MR. SINDELL: Well, I mean I might
17 have to ask him some questions about it and
18 we've got some limited time.

19 MS. JOHNSON: Well, you just gave
20 me your discovery requests today; but, yes,
21 I'm going to get them to you after I've had
22 a chance to look at them myself because I
23 haven't had a chance.

24 MR. SINDELL: Three or four days
25 before the discovery cutoff, right?

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1 MS. JOHNSON: No. And if you look
2 at the bottom here, just you do see part of
3 an email from your client, so I wonder if
4 your client might have that email as well.

5 MR. SINDELL: Oh, I haven't found
6 it, but you're right.

7 MS. JOHNSON: So I just wanted to
8 show you that.

9 MR. SINDELL: Thank you for that
10 because I didn't notice it. You're
11 absolutely right.

12 MS. JOHNSON: So I think there's
13 more of a chain with this --

14 MR. SINDELL: There may well be.

15 MS. JOHNSON: -- that is not
16 included.

17 MR. SINDELL: Obviously I'm
18 requesting the chain.

19 MS. JOHNSON: Sure.

20 BY MR. SINDELL:

21 Q. All right. Then you say, "I am also available
22 Thursday or Friday" -- December 20th is a
23 Tuesday -- "so please advise if you have time to
24 meet."

25 Right?

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1 A. Yes, that's what it says.

2 - - - -

3 (Thereupon, Plaintiff's Exhibit 16, 12/23/16
4 Kafer "Medical Documentation Received" email
5 to Lisan, et al., was marked for purposes of
6 identification.)

7 - - - -

8 Q. All right. This is Exhibit 16. 16 is a simple
9 email with copies as indicated dated December
10 23rd, 2016, correct?

11 A. Yes.

12 Q. You indicate to Dr. Lisan that you received his
13 medical documentation and that you'll be meeting
14 with HR about his case and so on and so forth
15 that it's private and what you're going to
16 discuss. It's self-explanatory, right?

17 A. Yes.

18 - - - -

19 (Thereupon, Plaintiff's Exhibit 17, 12/27/16
20 Request for Medical Documentation, was marked
21 for purposes of identification.)

22 - - - -

23 Q. Now let's go to Exhibit 17 and I will take off
24 the note.

25 MS. JOHNSON: You're no fun.

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1 Q. It really isn't anything revealing. Nothing
2 brilliant.

3 All right. You can take a minute and look at
4 it.

5 A. Okay.

6 Q. This is, can you identify this document?

7 A. Yes, I can.

8 Q. Okay. What is it?

9 A. It is a VA form 0857e filled out by Dr. Kramer
10 and he signed it on --

11 Q. She.

12 A. It's a she?

13 Q. Yes.

14 A. She signed it on December 27th, 2016.

15 Q. Okay. And I take it you read this?

16 A. Yes, I did.

17 Q. Okay. Did you pass it on to somebody?

18 A. No.

19 Q. Did you send it to Dr. Raphaely?

20 A. No.

21 Q. For what purpose did you need this?

22 A. To process Dr. Lisan's RA request.

23 Q. What use did you make of this record to process
24 his request?

25 A. I was able to determine from this medical

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1 documentation that I did not have what was
2 needed, that all I had in this documentation was
3 what could happen to Dr. Lisan.

4 What was missing was the medical
5 documentation that's needed that describes how
6 his disability was impairing the performance of
7 essential functions.

8 **Q. Okay. Would you please elaborate for me on what**
9 **you mean by "how his disability was impairing his**
10 **ability to perform essential functions" that you**
11 **just stated? What do you mean by that that you**
12 **were looking for?**

13 **A. Okay. What I mean is at this point with this**
14 **initial medical documentation and everything else**
15 **that was provided, there was nothing that**
16 **informed me how his disability impaired the**
17 **performance of essential functions.**

18 This says what could happen. What could
19 happen is irrelevant because it's a future based
20 notation.

21 What I need to know is, for instance, in a
22 hypothetical example, if I may.

23 **Q. Yes, you may.**

24 **A. If walking was an essential function of**
25 **Dr. Lisan's job and he got ran over by a car and**

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1 lost his leg and he was no longer able to walk,
2 that would be, and it was documented that he is
3 unable to walk, that would be a clear delineation
4 of an impairment of an essential function.

5 Nowhere in this medical documentation or any
6 other medical documentation that was supplied to
7 me did I have that kind of information.

8 All I had was this information which failed
9 to meet the criteria needed and Dr. Lisan's
10 statements that were in writing that he was
11 performing on-call duties.

12 **Q. Okay. What did the fact that he was performing**
13 **on-call duties mean to you?**

14 A. That there was no impairment from his disability
15 that he was unable to perform on-call duties.

16 **Q. So you concluded that he was able to perform**
17 **them?**

18 A. Upon receiving this and whenever I received his
19 documentation that said he was doing that, that's
20 what I was concluding; but as I recollect in
21 looking at the sequence of things, likely at this
22 juncture I would have been looking for that and
23 then subsequent to this, I would have sent him a
24 message saying what we needed and why this didn't
25 meet the criteria.

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1 Q. Well, did you do that?

2 A. Yes.

3 Q. Did what?

4 A. Sent him a communication about what was needed.

5 Q. And that communication said what? Said we needed
6 what?

7 A. Medical documentation that shows how your
8 disability impairs the performance of essential
9 functions.

10 Q. Did you send that to him?

11 A. Yes.

12 MR. SINDELL: Okay. I don't have
13 it so, we're going to ask that that
14 document be made available.

15 BY MR. SINDELL:

16 Q. As of the date of Exhibit --

17 MS. JOHNSON: Are you looking for
18 17?

19 MR. SINDELL: 17.

20 MS. JOHNSON: Here you go.

21 Q. I got it. I'm just looking for the date.

22 Which was received on December 23rd by you,
23 according to your email, anyway, right?

24 A. On my email of December 23rd I referenced
25 receiving medical documentation.

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1 **Q. Okay.**

2 A. However, I do not know -- it could not have been
3 this because this is dated the 27th.

4 A large file was also sent to me that
5 included extensive medical documentation.

6 **Q. From Rogers, the place where he was?**

7 A. Yes. The inpatient facility.

8 **Q. Did you ever send that to him?**

9 A. No.

10 **Q. Is he entitled to it? It's his record?**

11 A. If he wanted it, he could have requested it.

12 MR. SINDELL: Okay. I'm
13 requesting it now.

14 So I'm asking for his medical
15 record.

16 MS. JOHNSON: Well, he has his own
17 medical records.

18 MR. SINDELL: I don't know what he
19 has or doesn't have.

20 MS. JOHNSON: Well, he should have
21 his own medical records.

22 MR. SINDELL: I'd like to have
23 what you were sent.

24 MS. JOHNSON: Okay.

25 - - - -

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1 (Thereupon, Plaintiff's Exhibit 18, 1/11/17
2 Raphaely "meeting CX" email to Lisan, was
3 marked for purposes of identification.)

4 - - - -

5 Q. All right. Now, Exhibit 18.

6 Okay. Have you had a chance to look at
7 Exhibit 18?

8 A. Yes.

9 Q. Okay. This is not copied to you?

10 A. Correct.

11 Q. Have you ever seen this email before?

12 A. No.

13 Q. Has it ever been described to you before?

14 A. I don't recall. This is, this has your name at
15 the top, Steven Sindell.

16 Q. I know what it has.

17 A. And, so no.

18 Q. Okay. It's a letter or an email rather dated
19 January 11th, 2017 at 10:55 a.m. from Susan
20 Raphaely to Ron?

21 A. Yes.

22 Q. And I'll read it.

23 It says, "Ron: Our meeting scheduled for
24 10:00 a.m. Thursday," so this is the day before,
25 correct?

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1 A. Correct.

2 Q. "Has been cancelled. Bruce Kafer, the Reasonable
3 Accommodation Coordinator, stated he will reach
4 out to you directly with what has been decided
5 based on your medical documentation."

6 Did I read that correctly?

7 A. Yes, you did.

8 Q. Okay. Well, it attributes to you a statement?

9 A. Yes, it does.

10 Q. Is that accurate? Did you state that you will
11 reach out to Ron directly with what's been
12 decided based on his medical documentation?

13 A. Probably.

14 Q. Well, what's your doubt about it?

15 A. Well, I don't have an exact, a recollection of
16 the chronology of the events because I sent more
17 than one message to Dr. Lisan explaining about
18 the medical documentation and what was needed and
19 it's not uncommon that that would occur, that
20 people need explanations because it's kind of an
21 unusual process.

22 Generally speaking, you have to convey this
23 message, this information to every requester
24 because there is a need for clarification.

25 Q. My question to you, let me see if I can simplify

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1 it.

2 She's attributing to you a statement that you
3 will reach out to him "directly with what has
4 been decided based upon your medical
5 documentation."

6 Do you understand that to mean that there's
7 no need for an actual meeting and that between
8 you, Dr. Lisan and her, because it says "our
9 meeting," that it's simply going to be decided
10 now?

11 A. What I understand this to mean is that I was,
12 made decisions about his medical documentation
13 and needed to communicate with him.

14 There was an opportunity to set up a meeting
15 and then the meeting was cancelled and then I
16 would have followed up with him by email or
17 provided more emails about the documentation and
18 what was needed.

19 Q. Okay. So --

20 A. Because that is the standard process.

21 Q. Okay. So do I understand you then to be saying
22 that on Wednesday January 11, 2017 at 10:55 a.m.
23 your understanding was that you were waiting for
24 more communication with Ron Lisan and more
25 medical details before a decision about his

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1 reasonable accommodation request would be made?

2 A. Not exactly.

3 Q. Okay. Why don't you correct it, then, and tell
4 me what's correct.

5 A. Because he needed more information about what I
6 received and why this was insufficient and what
7 was needed, so the practice is when you receive
8 medical documentation and it doesn't meet what's
9 needed, you let the requester know so they can go
10 back to their provider and get it if there is
11 actually medical documentation about what's
12 needed but the requester has to communicate with
13 their provider.

14 Q. Okay. But you got what you called inadequate
15 information, medical information from him?

16 A. Correct.

17 Q. Back on December 23rd, didn't you?

18 A. Yes.

19 Q. Okay. So you needed more?

20 A. Yes.

21 Q. It would be December 23rd and January 10 or 11
22 that you would have communicated with him that
23 you needed something more, correct?

24 A. Possibly.

25 Q. Or not?

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1 A. I don't have an exact recollection.

2 **Q. Well, wouldn't that seem to be the case here?**

3 A. It is clear I was asking for more medical
4 documentation because I was not getting what was
5 needed.

6 It is also possible that I was going to
7 inform him that I don't have what's needed and we
8 need to move on to the next step.

9 This was in 2017. I don't have an exact
10 recollection.

11 **Q. What was the next step?**

12 A. The next step would have been that his case would
13 have been, that there would have been a closure
14 of his case, of his reasonable accommodation
15 request because it didn't meet the criteria.

16 **Q. Okay. Meet the criteria of describing how his**
17 **disability might impair his ability to do the**
18 **functions of the job. Is that what you mean?**

19 A. No. Not might. How his disability impairs the
20 performance of essential functions.

21 **Q. Not might, but does?**

22 A. Right.

23 **Q. Well, let's see if this clarifies things just a**
24 **little bit. This will be Exhibit 19.**

25 - - - -

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1 (Thereupon, Plaintiff's Exhibit 19, 1/12/17
2 Raphaely/Lisan, et al. "February Call
3 Schedule" email string, was marked for
4 purposes of identification.)

5 - - - -

6 Q. Okay. Were I'm concentrating on the bottom one,
7 Susan Raphaely January 12, 2017. Do you see
8 that?

9 A. Yes. Okay.

10 Q. This is not to you, obviously, correct?

11 A. Correct.

12 Q. It's Dr. Raphaely to Ron Lisan basically saying
13 we're making the schedule and if you want to
14 continue to work in the full-time anesthesia
15 service, you will be placed on the February call
16 schedule.

17 Is that what it says?

18 A. Yes.

19 Q. So you would consider that to be something
20 that -- withdrawn.

21 Since he wasn't given at this point in time,
22 January 12th, 2017, a reasonable accommodation
23 for any gradual assumption of on-call duty, would
24 you agree that this is an appropriate email from
25 Susan Raphaely to him?

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1 A. Yes.

2 Q. Okay. This will be Exhibit 20.

3 - - - -

4 (Thereupon, Plaintiff's Exhibit 20, 1/12/17
5 Lisan 1/12/17 "Re: Meeting on Reasonable
6 Accommodation" email to Kafer, was marked for
7 purposes of identification.)

8 - - - -

9 Q. All right. Go ahead and take a minute and read
10 it if you would.

11 A. Okay.

12 Q. This date, this is an email from Ron Lisan to
13 you, right?

14 A. Correct.

15 Q. Do you remember it?

16 A. Somewhat, yes.

17 Q. It is dated Thursday January 12th at --

18 A. 6:44 p.m.

19 Q. -- 6:44 p.m., right. On the subject of
20 reasonable accommodation; is that correct?

21 A. Yes.

22 Q. Okay. This was the day after the meeting was
23 cancelled that had been planned for the date of
24 January 12th, 2017?

25 A. Correct.

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1 Q. Okay. So the 18th the meeting was cancelled?

2 A. No.

3 Q. Here. It's right here.

4 A. January 11th.

5 Q. I'm sorry.

6 A. The meeting was cancelled.

7 Q. You are correct. The day before. On January
8 11th the meeting was cancelled for January 12th,
9 the meeting that was set for January 12th,
10 correct?

11 A. I think so.

12 Q. Well, it says it, doesn't it? 10:00 a.m.?

13 A. Oh. Yeah. Thursday.

14 Q. Yes?

15 A. Okay. Yes.

16 Q. And the cancellation letter refers to "our
17 meeting." Would that have included Dr. Raphaely?

18 A. Possibly. It looks to be that way.

19 Q. Okay.

20 A. It would not be unusual for a supervisor to be in
21 a meeting with, related to RA.

22 Q. Okay. Who cancelled the meeting?

23 A. I did.

24 Q. Why?

25 A. I don't recall exactly. There was a conflict so

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1 I communicated as quickly as possible because I
2 know he's busy and Dr. Raphaely seemed to be able
3 to always find him, so...

4 Q. Okay. So on Wednesday the meeting for Thursday
5 is cancelled. The cancellation says that you're
6 going to reach out directly. You, Bruce Kafer --

7 A. Correct.

8 Q. -- "will reach out directly with what has been
9 decided based on your medical documentation;" is
10 that correct? That's what it says?

11 A. Correct. That's what it says.

12 Q. All right. Then the next day instead of a
13 meeting that had already been cancelled Ronald
14 Lisan writes the following to you:

15 "I was notified yesterday that the planned
16 meeting for my reasonable accommodation request
17 was cancelled - I was not given a reason why."

18 Did I read that correctly?

19 A. Yes, you did.

20 Q. Okay. And that's accurate. It was cancelled
21 yesterday, meaning on Wednesday the 11th of
22 January, right?

23 A. Yes.

24 Q. Then he writes, "That is currently a significant
25 issue, since I have received communication from

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1 Dr. Raphaely requesting me to submit my call
2 request for February as soon as possible as well
3 as to discuss the holiday" coverage call -- I'm
4 sorry, "holiday call coverage I will take."

5 Did I read that correctly?

6 A. Yes.

7 Q. "Obviously I cannot put in my call requests until
8 I have the parameters for the reasonable
9 accommodation defined."

10 Did I read that correctly?

11 A. You read that correctly.

12 Q. "As you know from my medical documentation,
13 working gradually back into the regular call
14 schedule has been recommended by my providers."

15 Did I read that correctly? Did I read it
16 correctly?

17 A. Yes. And what's notable --

18 MR. SINDELL: That's the only
19 question --

20 A. -- about this --

21 MR. SINDELL: -- I asked him. I
22 didn't ask him any other question.

23 MS. JOHNSON: Right. Now, he did
24 answer, though, your question.

25 MR. SINDELL: Now he wants to

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1 explain an answer "yes"?

2 A. I was interrupted again.

3 MS. JOHNSON: Well, no, stop.

4 MR. SINDELL: A question that says
5 "did I read it correctly" does not call for
6 an explanation.

7 MS. JOHNSON: But he did answer
8 yes, that you read it correctly.

9 MR. SINDELL: Yes. But he was
10 going on to give some more talk about it.
11 What's beyond yes?

12 MS. JOHNSON: Well, if he thinks
13 he needs to add to his answer, he's
14 permitted to do that.

15 **Q. You need to add to the answer yes, I read it**
16 **correctly?**

17 A. Yes.

18 **Q. What more do you need to add to answer the**
19 **question did I read it correctly?**

20 A. Because you read "As you know from my medical
21 documentation, working gradually back into the
22 regular call schedule has been recommended by my
23 providers."

24 And that is relevant because a recommendation
25 is much different than documentation --

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1 MR. SINDELL: Oh, I -- that's not
2 answering my question.

3 A. -- that shows there is an impairment of essential
4 function.

5 MS. JOHNSON: Bruce, let's stop
6 for a second here. I think you're going
7 beyond the question. I agree with Steve
8 here.

9 A. Okay. Well, I have no way of knowing.

10 MS. JOHNSON: So let's just go on,
11 please.

12 Q. I do want to give you an opportunity to explain
13 it, but you need to wait until I ask you that.

14 A. Well, I'm new at this, Mr. Sindell.

15 Q. I thought you had had depositions before.

16 A. I've had one deposition before in my entire
17 lifetime and this is my second one.

18 MS. JOHNSON: Stop. Stop.

19 Q. All right. Let's get over this.

20 A. Oh, okay.

21 Q. All right. I want to -- you know what? I don't
22 have any more questions about this.

23 A. Okay.

24 Q. All right. This will be Exhibit 21.

25 - - - -

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1 (Thereupon, Plaintiff's Exhibit 21, 1/13/17
2 Lisan "Personal & Confidential - Information
3 on Reasonable Accommodation Request &
4 Meeting" email to Kafer, was marked for
5 purposes of identification.)

6 - - - -

7 A. Okay.

8 Q. Do you recall this email?

9 A. Yes.

10 Q. And by "recall this email," I mean recall
11 receiving it?

12 A. Yes.

13 Q. At about the time indicated?

14 A. Correct.

15 Q. I just used that for ID. I'm going to hand you
16 Exhibit 22.

17 - - - -

18 (Thereupon, Plaintiff's Exhibit 22, Kafer
19 letter to Lisan, was marked for purposes of
20 identification.)

21 - - - -

22 A. Okay.

23 Q. All right. Now I'd like to, first of all, you
24 wrote this to Dr. Lisan; is that correct?

25 A. Correct.

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1 Q. Okay. It doesn't have a date on it anywhere.

2 Can you help me out with that?

3 A. It looks like it was in response to a message he
4 had sent me on Thursday January 19th, 2017 at
5 9:23 a.m.

6 Q. That's what I thought, too.

7 Does that look -- it looks that way to you as
8 well, right?

9 A. Yes.

10 Q. So I'd like you to look at the third paragraph on
11 the first page?

12 A. Okay.

13 Q. It's actually numbered Page 2?

14 A. Got it.

15 Q. But it's the first page of your email.

16 This was an email, wasn't it?

17 A. To my knowledge this was an email.

18 Q. It's almost like a letter. Okay?

19 MS. JOHNSON: It's kind of, this
20 format looks funny. It looks like it's
21 gotten reformatted in some weird way.

22 A. It could have been an attachment.

23 DR. LISAN: This part is missing
24 up here.

25 Q. Okay. It's not important, Ron. I think we got

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1 it right.

2 Okay. It says here in the third paragraph,
3 "In your case," meaning in Dr. Lisan's case,
4 correct?

5 A. Right. Referring to his reasonable accommodation
6 case.

7 Q. Yes, of course.

8 "In your case, being" quote, "on call,"
9 quote, "is an essential function of your position
10 as an anesthesiologist."

11 A. Correct.

12 Q. And I read that correctly; is that right?

13 A. Yes, you did.

14 Q. "You are requesting the VA to take away an
15 essential function."

16 Did I read that correctly?

17 A. Yes, sir.

18 Q. Where did you get the idea that Dr. Lisan was
19 requesting the VA to take away an essential
20 function?

21 A. Because he was requesting to be exempted from
22 call duty.

23 Q. And how do you know that other than Dr. Raphaely
24 told you that?

25 A. I know that from the medical documentation that

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1 was submitted and Dr. Raphaely's message and
2 possibly emails sent by Dr. Lisan although I
3 cannot recall those specific emails at this time.

4 Q. Okay. What Dr. Kramer said in her medical report
5 related to certain risks and recommendations --

6 A. Correct.

7 Q. Let me finish. I hadn't finished but I
8 understand why you didn't know that. Okay?

9 Dr. Kramer's medical information sent to you
10 indicated certain risks to Dr. Lisan with respect
11 to his obsessive-compulsive disorder problem; is
12 that correct?

13 A. Yes.

14 Q. It did not have to do with his being impaired in
15 doing the so-called essential function of the
16 anesthesiology position of on call, right?

17 A. Can you say that again?

18 MR. SINDELL: Read it back.

19 TH NOTARY: "It did not have to do
20 with his being impaired in doing the
21 so-called essential function of the
22 anesthesiology position of on call, right?"

23 A. Correct.

24 Q. So there is nothing in Dr. Kramer's medical
25 documentation that you received which stated that

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1 Dr. Lisan was requesting that on call be
2 eliminated or taken away from his position, is
3 there?

4 A. It says in the medical documentation, Plaintiff's
5 Exhibit 17, in Section 3 where it says, "To be
6 excused from 'on-call' duties for nights,
7 weekdays, weekends and holidays, et cetera. It
8 is unclear if this is a time limited request."

9 Q. Okay. Now, that's what she wrote concerning his
10 condition and her recommendations?

11 A. I don't know if she wrote that.

12 Q. Well, let's assume she did. Okay? It's her
13 record. I think she even signed it.

14 We're not going to quibble about what's
15 written there.

16 All I'm saying is simply that that comes,
17 that isn't written by Dr. Lisan, is it?

18 A. All I'm noting is that --

19 Q. Please answer my question.

20 A. -- the top is typed and then Dr. Kramer wrote in
21 printing.

22 Q. Oh, yes but Dr. --

23 A. So I don't know.

24 Q. Dr. Kramer did not say anything about what
25 Dr. Lisan personally was requesting in the way of

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1 on-call duty or not on-call duty.

2 A. No. It appeared she was responding to what's
3 written in Number 3.

4 Q. Right. Okay.

5 But that's, but the person who requests the
6 reasonable accommodation is not the medical
7 doctor, it's the employee, isn't it?

8 A. The employee is the requester and they must get
9 their medical documentation from their medical
10 doctor.

11 Q. But you still have to know what the employee is
12 requesting before you can make any decision about
13 the reasonable accommodation, don't you?

14 A. Who has to know?

15 Q. You.

16 A. Yes. I knew that he was requesting to be
17 exempted from on call.

18 Q. Okay. And that's based, but that's not based on
19 what Dr. Kramer wrote, is it? It doesn't say
20 what he's requesting, does it?

21 A. No.

22 Q. Okay.

23 A. Except for Number 3.

24 Q. No. Except for nothing. It doesn't say he's
25 requesting it. It says he should be excused from

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1 it?

2 A. It doesn't say who wrote it. In Number 3.

3 Q. Oh, you're reading Number 3?

4 A. Correct.

5 Q. Well, it's typed there, isn't it?

6 A. That's what I said.

7 Q. I'm sorry. I wasn't looking at it. I should
8 have been, so I apologize.

9 So you typed in here in Number 3, not
10 Dr. Lisan, "to be excused from on-call duties for
11 nights, weekdays, weekends and holidays, et
12 cetera. It is unclear if this is a time limited
13 request."

14 You typed that, didn't you?

15 A. Possibly or Dr. Lisan did because in some cases
16 the requester types these areas in and in other
17 cases, I will type them in to assist them.

18 I don't have recollection because I do so
19 many of these.

20 Q. But you could have typed it in; is that correct?

21 A. Yes, I could have.

22 Q. And if Dr. Kramer didn't type it in?

23 A. It would be unlikely Dr. Kramer would type that
24 in because it looks like Dr. Kramer wrote in
25 handwriting.

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1 Q. Okay. And if Ron didn't type it in?

2 A. Then it would be possible that I typed it in.

3 Q. Okay. Why would you type that in?

4 A. If I were to type this in, I would be conveying
5 to the doctor what the request is.

6 Q. Okay. And when you wrote that the request --
7 withdrawn.

8 I know you're telling me you don't remember
9 if you wrote it; but let's assume that you did
10 for a moment. Okay?

11 "To be excused from on-call duties for
12 nights, weekends, weekends and holidays, et
13 cetera."

14 If you wrote that, where would you have
15 gotten that information to write that or type
16 that in there on Number 3?

17 A. Either from Dr. Lisan or Dr. Raphaely.

18 Q. Do you remember which one?

19 A. No.

20 Q. It could have been just from Dr. Raphaely?

21 A. It's possible in the absence of my recollection.

22 - - - -

23 (Thereupon, Plaintiff's Exhibit 23, 1/18/17
24 Kafer "Follow Up On Call" email to Lisan, was
25 marked for purposes of identification.)

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- - - - -
Q. All right. I hand you what's been marked as --
you know I didn't staple these so I'm going to
give this one to you just like that.

MS. JOHNSON: Okay. Are we on 23?

MR. SINDELL: Yes. How's that for
moving along?

- - - - -
(Thereupon, a discussion was had off the
record.)

- - - - -
Q. You've got 23?

A. Yes. I read it.

Q. All right. Let me know when you're ready.

Okay? Are you ready?

A. I am ready.

Q. All right. This was Wednesday, January 18, 2017
from you to Dr. Lisan, right?

A. Yes.

Q. And you called it "follow-up on call" with high
importance, right?

A. Yes.

Q. And you wrote: "Dr. Lisan: I want to make you
aware that you are free to make a transfer
request to another position which has no

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1 'on-call' duties."

2 My first question is were you referring to an
3 anesthesiology position?

4 A. I don't know. I did not specify. All I said was
5 another position.

6 Q. So you don't know if it was an anesthesiology
7 position?

8 A. Correct.

9 Q. Okay. What other position might it have been?

10 A. Medical doctor, physician.

11 Q. But you know he's an anesthesiologist. He's not
12 an internist. He's not a surgeon?

13 A. Correct.

14 Q. So what --

15 A. But I recall at the time he had a problem with
16 the on-call paging duties.

17 Q. But in any event, whatever he had a problem with,
18 my question again is: What other position in the
19 VA -- you're referring to the VA, aren't you?

20 A. Yes.

21 Q. Okay. What other position in the VA other than
22 one having to do with his specialty would you
23 expect him to be seeking?

24 A. I didn't have any expectations about seeking. I
25 wanted to inform him of that option because it

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1 seemed like the on-call duties were a major issue
2 to him and it seemed like he was trying to use
3 the reasonable accommodation process to get out
4 of them.

5 Because he didn't meet the criteria for
6 reasonable accommodation, he still wanted to get
7 out of them, so I wanted to let him know that he
8 could transfer to another position that didn't
9 have -- potentially transfer that did not have
10 on-call duties and like we have a lot of
11 physicians that work ambulatory care jobs or
12 outpatient care jobs where they would not be on
13 call and so you never know what somebody is
14 interested in, so I was providing this as a
15 courtesy to him.

16 **Q. I see.**

17 A. And also informing him about Carlton Daniel.

18 **Q. You had no expectation one way or the other that**
19 **he would find an available position that had**
20 **nothing to do with anesthesiology, did you?**

21 A. I had no expectations beyond providing him this
22 information.

23 **Q. Right. You had no way of knowing what his**
24 **prospects were for another position; is that**
25 **correct --**

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1 A. Well --

2 **Q. -- at the VA?**

3 A. I -- the only awareness I have is when I look at
4 the USA Jobs postings a lot because we're also
5 dealing with reassignment for people.

6 So when an RA requester, for instance, is
7 unable to perform the essential functions of
8 their position due to a disability and we're
9 unable to provide an accommodation so they can,
10 then we look at reassignment.

11 So I'm often looking at USA Jobs and I do see
12 physician postings because it seems like we are
13 always in need of physicians. Dr. Lisan is a
14 physician. Dr. Lisan didn't want to do call
15 work. I had really no knowledge beyond what I
16 had in front of me but that's what was evident at
17 the time so that's why I wanted to inform him
18 maybe you could get another job where there's no
19 on call if this is a real issue and Carlton could
20 help you.

21 **Q. When you say "maybe," okay? You have no way of**
22 **assessing how positive or negative the maybe was?**

23 A. Right.

24 **Q. For Dr. Lisan?**

25 A. Correct.

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1 Q. At the VA?

2 A. Correct.

3 Q. That's all I'm asking.

4 A. Okay.

5 Q. Okay? Now, you wanted to take a break?

6 MS. JOHNSON: Yes.

7 - - - -

8 (Thereupon, a recess was had.)

9 - - - -

10 Q. Let's start with Exhibit 6.

11 All right. I have some questions about the
12 sexual harassment protocol that we left off I
13 talked to you about it early in the deposition
14 and then skipped to the reasonable accommodation.

15 So I want to go back to what your knowledge
16 is of the procedure and protocol of the sexual
17 harassment complaint.

18 A. Okay.

19 Q. And, again, just for context, I kind of like the
20 employee 1/employee 2 example where employee 1
21 says something that has a sexual innuendo that
22 may be or is offensive to employee 2?

23 A. Okay.

24 Q. Remember that?

25 A. Yes.

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1 Q. Now, we did talk about the appropriateness of
2 going to Dr. Raphaely if you were a CRNA who had
3 a complaint of sexual harassment against an
4 anesthesiologist or another employee in the
5 department of anesthesiology and we talked a
6 little bit about Robert Bearss but I'm going to
7 take with Raphaely because there's no question
8 about that appropriateness that you've indicated.

9 A. Uh-huh.

10 Q. Yes?

11 A. Yes.

12 Q. Now, let me just share this with you.

13 I've talked to a number of CRNAs,
14 anesthesiologists but mostly CRNAs who have been
15 to these education meetings on sexual harassment
16 and also done the trainings on-line and there
17 were a number of them. You, I can't imagine you
18 had anything to do with those particular
19 trainings, right?

20 A. No, I was not involved in any of the trainings.

21 Q. But I mean some of them were mandatory and they
22 had signatures when they attended, attendance
23 sheets and so forth but this is what I'm basing
24 it on: What their recollections were, as I
25 understood it, of what they were told.

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1 A. Okay.

2 Q. So what I'm going to do, I'm just telling you
3 this to help out, maybe speed it up, is to ask
4 you what your knowledge is from your perspective
5 in your position as a fact finder about the
6 things that they believed they were trained in
7 and taught about the procedures. Okay?

8 A. Okay.

9 Q. So you got the context.

10 A. Yes.

11 Q. All right. Now, if a complaint is made by a CRNA
12 to Dr. Raphaely about Dr. Lisan which has some
13 indication of a remark or statements verbally
14 that Dr. Raphaely allegedly made that were
15 offensive to --

16 MS. JOHNSON: I'm sorry to
17 interrupt you, Steve, but I think you said
18 Dr. Raphaely and you pointed to him so I
19 just wanted to make sure the record was
20 clear.

21 Q. Thank you. Let me say it again.

22 If a CRNA went to Dr. Raphaely to make a
23 complaint about allegedly offensive remarks that
24 Dr. Raphaely made --

25 MS. SINDELL: Dr. Lisan.

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1 Q. Dr. Lisan, excuse me, made to them, it would be
2 appropriate for Dr. Raphaely to say to the CRNA
3 please write it up?

4 A. Yes.

5 Q. In an ROC, report of contact, form?

6 A. Correct.

7 Q. Presumably sign it, there's a space to sign
8 there; is that correct?

9 A. Yes.

10 Q. And do you know upon being informed of such a
11 complaint of sexual harassment or offensive
12 verbal communication by a CRNA whether
13 Dr. Raphaely has any function or protocol
14 requirement to try to mediate the offensive
15 conduct that's alleged? In other words talk to
16 the allegedly offending party, talk to the
17 complaining party, possibly get them together or
18 at least try to work it out so it doesn't happen
19 again?

20 A. Yes. In this Medical Center Policy 003.003 it
21 has --

22 Q. MCP?

23 A. Yes. 003-003 as referred to on or referenced on
24 Exhibit 6, there are things listed that
25 Dr. Raphaely should do which include the things

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1 that you were referencing. In other words she
2 plays a part in addressing the allegation of
3 sexual harassment with the broader goal of
4 responding appropriately to the allegation and
5 then also ideally preventing future examples of
6 sexual harassment.

7 **Q. What does MCP stand for?**

8 A. Medical Center Policy.

9 **Q. What kind of a form would those things be written**
10 **in?**

11 A. They would be written in like a Microsoft Word
12 document. Looks similar to this format. They're
13 all available on the intranet site.

14 **Q. When you say the Internet site, available to me**
15 **or available to Ron?**

16 A. You would not be able to access the intranet
17 site. I'm unaware if you would be able to get
18 them on the Internet site. You might be able to
19 but Ron would have the ability to access all
20 medical center policies.

21 DR. LISAN: Would I be able to
22 forward it though to Steve?

23 A. Only if you saved it to a file and then forwarded
24 it from the file, so you'd use the save as
25 function and then you could attach it to an email

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1 and send it to him.

2 **Q. So I don't need Lisa to send it to me. He can**
3 **get it?**

4 A. He could.

5 DR. LISAN: Of course it's easier
6 if they did. Easier for me.

7 MR. SINDELL: Pardon me?

8 DR. LISAN: It's easier for me if
9 she sends it.

10 MR. SINDELL: She'll take her time
11 possibly to send it because she's busy,
12 okay? And so are you. Well, that's
13 important. Off the record.

14 - - - -

15 (Thereupon, a discussion was had off the
16 record.)

17 - - - -

18 **Q. Do you recall, and you may not, the general gist**
19 **of those kinds of policies that you're talking**
20 **about now?**

21 A. Only in general that the manager would have
22 responsibilities to make sure that, you know,
23 identifying people who might have information or
24 be clear on who maybe else should be talked to
25 because if you're conducting a fact finding,

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1 those fact finders would need to know that
2 information.

3 Q. I lost you now.

4 If who's conducting?

5 A. Like when Leshelle and I conducted the fact
6 finding information.

7 Q. Oh, at that left?

8 A. Right. Dr. Raphaely might say hey, talk to that
9 Bearss guy, maybe he would -- he might have
10 information, so that's the type of role she would
11 play or she would assist us in freeing up Karin
12 Bonfili's schedule because normally she'd be
13 doing procedures and she would need time to then
14 come talk to us so she would help to coordinate
15 all those things.

16 Q. So that's interacting with the fact finding
17 people at your level?

18 A. Right.

19 Q. But I'm talking about before we get to your
20 level, okay?

21 I'm saying if somebody comes and makes a
22 complaint, simply a complaint. Two years ago he
23 made an offensive remark or the other day he said
24 something that suggested to me that he wanted to
25 sleep with me or something, you know, something

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1 like that kind of thing -- we can go over them
2 but you may remember, I don't know -- but those
3 kinds of things, would you agree with me that
4 sometimes just a simple discussion that this is
5 offensive and I didn't mean to be offensive and
6 so on and so forth can resolve it?

7 A. Possibly.

8 Q. Yeah. I mean isn't it worth the effort to
9 resolve those kinds of things rather than
10 immediately file a charge?

11 A. Well, resolution is important but if a manager
12 thinks there may be an allegation of sexual
13 harassment, then it's incumbent upon them to
14 follow MCP 003.003.

15 Q. And what does the actual MCP 000.003 --

16 A. Medical Center Policy 003.003.

17 Q. What does it say that they have to file?

18 A. It's the prevention and management of sexual
19 harassment.

20 Q. Okay. Well, I can read it so that's what we
21 need.

22 Would you agree with me that threatening
23 CRNAs on the part of a manager or supervisor such
24 as Dr. Raphaely -- I'm not saying this as a fact
25 but as a hypothetical. Okay?

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1 A. Okay.

2 Q. Threatening CRNAs and coercing them to make false
3 claims of sexual harassment or sexual offense or
4 any kind of offense against an anesthesiologist
5 in order to get rid of him would be highly
6 improper?

7 A. I would agree.

8 Q. What should be the consequence or procedure if
9 something like that actually were to occur? And
10 again it's a hypothetical; but if something like
11 that were to actually occur, what remedy would
12 there be for the injured individual to deal with
13 a manager or a chief or somebody who would do
14 something like that?

15 A. I have no idea. I would have to ask our agency
16 attorney or someone from human resources if for
17 some reason I wanted the answer to that question.

18 Q. Who would you go to first?

19 A. Human resources employee labor relations.

20 Q. Human resources is different than employee
21 relations, isn't it?

22 A. Employee labor relations is an aspect. It's one
23 of the divisions of human resources. Those are
24 the individuals who prescribe what discipline is
25 warranted based on whatever occurred.

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1 Q. Okay. So that's where you'd make your complaint?

2 A. That's where I would make my initial inquiry.

3 Q. Initial inquiry?

4 A. If I wanted to know what would be the recourse
5 for an individual who experienced that.

6 Q. Okay. Would there be anything out of line or
7 inappropriate about writing directly to the
8 executive director, Ms. Fuehrer?

9 A. It may be appropriate to CC her on communications
10 to employee labor relations but you really need
11 the subject matter experts to know like what
12 should be done.

13 Q. Well, if it was a CRNA or an anesthesiologist who
14 had a complaint of that nature, would it be
15 appropriate to go to the medical director
16 position formerly held by Dr. Altose?

17 A. They could go to any member of management and if
18 they were reporting in this hypothetical scenario
19 that something inappropriate occurred, it would
20 be incumbent upon that management official to
21 follow up.

22 Q. When you say "incumbent" upon that official, they
23 would, they could simply -- well, withdrawn.

24 I'm interested in what you mean by follow up.
25 Follow up meaning?

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1 A. They would have a responsibility, especially in a
2 sexual harassment case, to notify the appropriate
3 persons.

4 Q. Okay.

5 A. Which would also include the medical center
6 director.

7 Q. How about, if you know, outside the specific VA
8 facility but within the VA system? Are there any
9 avenues where you can bring those kinds of
10 complaints up such as special counsel? Inspector
11 general?

12 A. Yes. If you wanted to, you could report it to
13 any of those entities.

14 Q. And they could decide whether it's appropriate
15 for them to do something like that?

16 A. Right.

17 Q. To take steps. Okay?

18 A. They would likely contact our medical center
19 director who would then task our local EEO
20 office, Leshelle and me, with following up on it.

21 Q. Let me ask you this: If VA counsel, attorneys
22 like for example Ms. Shively's office were to
23 become aware of evidence that something like this
24 that I've already described with a manager was
25 going on, do you have any idea or understanding

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1 if they would have some kind of duty within the
2 VA as VA agents or employees to take any kind of
3 action about it?

4 A. To, in this hypothetical scenario?

5 Q. Yes.

6 A. If Ms. Shively's office was involved, she would
7 work with management towards an appropriate
8 resolution.

9 Q. She would have some responsibility to do
10 something if there was credible evidence and she
11 was presented with that and believed it that it
12 was a problem that needed to be solved of that
13 nature, correct?

14 MS. JOHNSON: Objection. You may
15 answer.

16 A. Possibly. I have no way of knowing what her
17 specific responsibilities would be.

18 Q. Okay. I understand.

19 And of course I'll ask you the same question
20 about the U.S. Attorney's Office, civil division.
21 You'd probably say it depends on what they
22 perceive their responsibilities to be as well.
23 You wouldn't know exactly, correct?

24 A. Right.

25 Q. Okay. Now, I would like to ask you a few

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1 questions, let's look at Page, the top of Page 3?

2 MS. JOHNSON: Of Exhibit 6? Of
3 Exhibit 6?

4 MR. SINDELL: Oh, I'm sorry, yes,
5 of course.

6 MS. JOHNSON: Okay.

7 Q. Of Exhibit 6, thank you.

8 At the bottom of Page 2 it says, "the CRNAs
9 alleging sexual harassment complaints are as
10 follows."

11 You wrote this report, right?

12 A. I wrote the final draft.

13 Q. How about the one you're looking at right now?

14 A. Yes, this is the final draft.

15 Q. Okay. So you wrote this?

16 A. I took what was written and then --

17 Q. Well, you're attributing it to yourself. You're
18 signing off on it as yours?

19 A. It's actually signed off on, it's coauthors Bruce
20 Kafer and Leshelle Reese.

21 Q. Okay. Do you accept your coauthorship?

22 A. Yes. I don't want to take all the credit.

23 Q. Is there any disagreement to your knowledge
24 between you and Leshelle Reese about the contents
25 of this report?

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1 A. No, there is not.

2 Q. All right. So you'll see the four women, CRNAs
3 at the top, Bonfili, Foster, Costanzo, Verb,
4 right?

5 A. Yes.

6 Q. Now tell me did you personally face to face have
7 conversations with any or all or some of them,
8 those four?

9 A. All four of them.

10 Q. In person?

11 A. Yes.

12 Q. Okay.

13 A. With Leshelle Reese.

14 Q. With Leshelle Reese, so the two of you were
15 together?

16 A. Correct.

17 Q. Did you take notes on what they were telling you?

18 A. I may have taken notes.

19 Q. Would you have kept them?

20 A. If I did, I would have given them to Leshelle
21 Reese to put in the, like the folder for the
22 case.

23 MR. SINDELL: Well, that's the
24 folder I'm requesting from counsel, so just
25 so we're clear, and whatever is in there,

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1 unless there's some privilege I'm not aware
2 of.

3 Q. Okay. Now, did you also see their ROCs? Read
4 their ROCs?

5 A. Probably.

6 Q. You're not sure?

7 A. Well, I don't have a specific recollection of
8 reading their ROCs but that would be a standard
9 procedure.

10 "Reports of contact were obtained from each
11 complainant and direct interviews were
12 conducted."

13 So I would say yes.

14 Q. Okay. That's your best recollection?

15 A. Yes, it is.

16 Q. Okay. Let's mark 24.

17 - - - -

18 (Thereupon, Plaintiff's Exhibit 24, Costanzo
19 Report of Contact, was marked for purposes of
20 identification.)

21 - - - -

22 Q. This is Exhibit 24. This is one of the exhibits.
23 We haven't had a deposition of Elaine Costanzo
24 but she's one of the four obviously mentioned by
25 you, correct?

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1 I'm sorry. You're reading.

2 A. Okay.

3 Q. The first question I have is does that refresh
4 your recollection of something that you actually
5 previously read in connection with your fact
6 finding of the EEOC issue?

7 A. It has some familiarity.

8 Q. Okay. Does it refresh your recollection about
9 what Ms. Costanzo may have told you aside from
10 what's written here?

11 A. Yes.

12 Q. She says, "In light of recent events involving my
13 female colleagues, I have decided to report the
14 following incidents as they pertain to Dr. Ron
15 Lisan and his inappropriate comments of a sexual
16 nature while caring for patients in the operating
17 room. These two incidents occurred roughly one
18 week apart two years ago when I first began my
19 CRNA position in the Cleveland VA."

20 Does the fact that these events occurred two
21 years ago affect anything about your evaluation
22 of them? Just that fact?

23 A. Yes.

24 Q. Tell me what.

25 A. Timeliness.

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1 Q. What do you mean by timeliness?

2 A. That it was so long ago that this occurred that
3 it would not have been serious enough at the time
4 to report it and so it would not be a basis for
5 arriving at a finding of -- the singular
6 incidents referenced here from two years ago
7 would not provide a basis to find for a finding
8 of sexual harassment.

9 Q. Okay. So the time factor then is a factor in
10 weighing whether there's sexual harassment or
11 not?

12 A. Correct.

13 Q. What did you understand or obtain from
14 Ms. Costanzo, if anything, regarding her
15 motivation "in light of recent events involving
16 my female colleagues"? Would that mean anything
17 to you or --

18 A. No. Just that she was reporting what happened
19 two years ago.

20 Q. Is there any indication here that she ever told
21 Ron Lisan that she was offended by anything
22 described here?

23 A. On this form?

24 Q. Yes.

25 A. No.

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1 Q. Or any of these events?

2 A. Are you referring to the events referenced on the
3 form?

4 Q. Yes.

5 A. Only looking at this form and considering what's
6 written here, then no.

7 Q. All right. Is there some kind of one to ten or
8 zero to ten scale on the gravity of an alleged
9 sexual harassment or offensive conduct, offensive
10 verbal conduct report?

11 A. Yes.

12 Q. Okay. Would you explain to me what that means?

13 A. What it means is would a reasonable person
14 conclude that repeated events or unwelcomed
15 advances created a hostile work environment based
16 on sexual harassment.

17 So it's the reasonable person standards. You
18 would be looking at everything.

19 Q. Right. Taking into account all the circumstances
20 you became aware of?

21 A. Right.

22 Q. Okay. So is ten the most egregious and zero the
23 least?

24 A. There's no quantitative scale that is used like
25 that.

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1 Q. Oh, I'm sorry. I may have misunderstood you.

2 You don't put numbers out there on them?

3 A. No. There's no quantitative scale that is used
4 like zero to ten in terms of severity. It is a
5 qualitative scale.

6 Q. Okay. Explain that to me.

7 A. It would be what a reasonable person would
8 conclude.

9 Q. Okay. But if you gradate them in any way -- well
10 let me back up then.

11 Do they get gradated in any way?

12 A. No.

13 Q. So nobody would -- withdrawn.

14 Did Leshelle Reese ever use or refer to that
15 kind of a scale, whether it's official or not,
16 it's a zero, it's an eight, it's a six, it's a
17 ten? Say something like that?

18 A. Not to my knowledge.

19 Q. You wouldn't know what she told Ron Lisan, would
20 you?

21 A. No.

22 Q. Well, basically you don't, I think you've told me
23 what you thought about this as a sexual
24 harassment complaint.

25 So you don't believe that this qualifies as a

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1 valid sexual harassment complaint against Ron
2 Lisan under the sexual harassment policy of the
3 VA, this Exhibit 24 from Elaine Costanzo?

4 A. I view this as a sexual harassment allegation
5 that did not rise to the level of sexual
6 harassment.

7 Q. Thank you.

8 Now, I'd like to go to this one. This is 25.

9 - - - -

10 (Thereupon, Plaintiff's Exhibit 25, Foster
11 Report of Contact, was marked for purposes of
12 identification.)

13 - - - -

14 Q. This is Exhibit 25. Please take a moment and
15 look at that.

16 A. Okay.

17 Q. Again same kind of question as the other one.

18 Does this -- well, this comes from Jessica
19 Foster, who is a CRNA, correct?

20 A. Yes.

21 Q. To your knowledge do you know who typed this?

22 A. I'm making an assumption that it's Jessica
23 Foster.

24 Q. It says at the bottom, "Executed By (signature
25 and title)." It's a box, right? At the bottom

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1 right?

2 A. Oh, yes.

3 Q. Yes. Did you notice that? Okay.

4 It's blank in this one.

5 Isn't it supposed to be signed?

6 A. I would think so.

7 Q. Did you, do you recall ever reading this document
8 before?

9 A. I think I have.

10 Q. Okay. Did it strike you as a problem that it
11 wasn't signed?

12 A. It's not always a problem because a person could
13 hand it to me and say they typed it.

14 Q. Okay. Well, do you know what happened here?

15 A. Do I know what happened as far as the signature?

16 Q. No. As far as handing it to you or not?

17 A. I don't recall.

18 Q. Well --

19 A. What would have happened is we would have asked
20 her questions about this in the interview.

21 Q. Sure. I'm sure of that.

22 So it doesn't particularly matter to you
23 necessarily if the person actually signs it?

24 A. In this case it would not have.

25 Q. When would it?

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1 A. If somehow I acquired it and I had no knowledge
2 of who it was from or if there was reason to
3 question the contents of what was written.

4 **Q. Isn't it the clear intent of a report of contact**
5 **that the person fills it out sign it?**

6 MS. JOHNSON: Objection. You may
7 answer.

8 A. The clear intent of a report of contact is to
9 convey information.

10 **Q. But doesn't it include in conveying information**
11 **by having a place here where somebody's supposed**
12 **to sign to attest to what is written in here that**
13 **in fact that person be required to sign the**
14 **document?**

15 A. Ideally they should sign the document. They
16 could also submit a report of contact within an
17 email so, or you could attach this to your email,
18 if it's in electronic version.

19 **Q. I understand that.**

20 A. It's just a statement.

21 **Q. Okay. I understand.**

22 **Well, do you remember what Jessica Foster**
23 **told you about this?**

24 A. Just what it says in the statement, that she had
25 this interaction. She felt uncomfortable. She

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1 left the office.

2 Q. Did you have any indication whether she told
3 Dr. Lisan that she felt uncomfortable about it?

4 A. No. She did not -- I recall nothing about her
5 informing him she was uncomfortable.

6 Q. All right. Did, do you recall Elaine Costanzo,
7 the first one I brought up here, telling you that
8 she informed Ron Lisan that she was uncomfortable
9 with anything he did or said?

10 A. I don't recall that.

11 I know that one of them informed him to stop
12 with sexual commentary and he did stop but I
13 don't remember which one at this time.

14 Q. Well, it's in your report. I'll show it to you;
15 but the other three did not --

16 A. Correct.

17 Q. -- tell Ron they were being offended in some way?

18 A. Correct.

19 Q. Is that, does that have any significance at all
20 to you in terms of the merits or demerits either
21 way of the claim of sexual harassment?

22 A. No. It would be irrelevant because sometimes
23 people are scared to say something.

24 Q. No. I understand.

25 I have one here from Karin Bonfili but I

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1 don't have the number, so that would be --

2 MS. JOHNSON: It's Exhibit 2.

3 A. Yes. Exhibit 2.

4 Q. Do you remember that one?

5 A. Yes, and I would like to read it.

6 Q. Oh, go ahead, yes. I don't want to stop you from
7 reading it.

8 A. Okay.

9 Q. Does this refresh your recollection as
10 to either --

11 A. Yes.

12 Q. -- what you had for lunch.

13 No. Off the record.

14 - - - -

15 (Thereupon, a discussion was had off the
16 record.)

17 - - - -

18 Q. Does this refresh your recollection concerning
19 your meeting with Karin Bonfili?

20 A. Yes.

21 Q. And do you think you read this before?

22 A. Yes.

23 Q. And the last one would be, it's not the last one.

24 There was a statement that she made, I don't
25 know which number it is?

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1 A. 3 or 4?

2 Q. That's it. You've got it. You're holding it
3 right there.

4 A. 3. Follow-up from Karin Bonfili?

5 Q. Yes. There was another one dated March 8th,
6 2017?

7 A. Yes, I have it.

8 Q. Did you actually ever read that before?

9 A. I need to read it now to see if it refreshes my
10 memory.

11 Q. All right.

12 A. Okay.

13 Q. Did you read that?

14 A. Yes, I did.

15 Q. Had you read that before?

16 A. I believe so.

17 Q. Did you, after reading that, tell Karin Bonfili
18 to go to the police, the VA police?

19 A. I think so.

20 Q. Okay. Do you know if the police, VA police
21 followed up with anything?

22 A. I'm sure they followed up.

23 Q. Do you know if any action was taken beyond
24 talking to Ron Lisan about it?

25 A. To my knowledge, there was no crime determined by

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1 the police. That's the sole reason for their
2 involvement is to determine if a crime occurred,
3 so then typically then they give it back to us if
4 there's any further administrative follow-up,
5 then we work with management.

6 Q. Okay. So you think, you weren't making a
7 determination based on this document whether or
8 not a crime was involved, were you?

9 A. No, that was not my role.

10 Q. Right. You just thought that it should be
11 examined by the police?

12 A. Yes, because there was touching reported --
13 allegations of touching.

14 Q. And it was an allegation of touching her in the
15 back?

16 A. Yes.

17 Q. All right. Now you indicated you talked to all
18 four of the CRNAs who made complaints?

19 A. Okay.

20 Q. Before you made your report as part of your fact
21 finding, right?

22 A. Right.

23 Q. Okay. Now, did you talk to Ron Lisan about these
24 written complaints?

25 A. I don't recall.

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1 Q. Wouldn't it be part of a fact finding to hear
2 what the alleged harasser said about the claims
3 being made against him?

4 A. Generally yes. I thought I saw in one of the
5 reports, the exhibits that he responded but in a
6 case where there is no finding of sexual
7 harassment, I could see where it would not be as
8 important.

9 Q. Let me ask you this: To the best of your
10 recollection, would it be fair to say that you
11 did not discuss with Dr. Lisan the allegations of
12 sexual harassment by Elaine Costanzo or by
13 Jessica Foster or by Rhonda Verb?

14 A. I would say it would be possible that I did not
15 discuss the case with Dr. Lisan; however I do not
16 know if Leshelle discussed it or if I would have
17 been absent that day and that could have been the
18 reason.

19 Q. Before you made your report, Exhibit 6, would it
20 be fair to say that you did not have any
21 discussion or knowledge of any discussion with
22 Dr. Lisan by anyone else including Leshelle
23 Reese?

24 A. I would say that is possible.

25 Q. Well, do you have any recollection of actually

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1 reading something that Leshelle Reese said
2 before --

3 A. No. I have no recollection of --

4 Q. Hold on.

5 Before this report was issued?

6 A. No, I have no recollection.

7 Q. All right. But I think what you're saying is
8 that your finding was that none of these four
9 claims, and I haven't even shown you Rhonda
10 Verb's but, okay, here it is. We'll get that one
11 in, too.

12 But none of these complaints were --
13 withdrawn. You didn't read anything about any
14 interviews with Ron Lisan before you wrote up and
15 signed your fact finding report here with,
16 regarding the complaints of those three, all of
17 them except Bonfili; is that correct?

18 A. What I'm saying is I do not have a specific
19 recollection.

20 However, in this exhibit, I see there's
21 reference to an interview with Dr. Lisan.

22 Q. Yes. You had an interview with him and I was on
23 the phone. It lasted, do you recall how long?

24 MS. JOHNSON: Objection. You may
25 answer.

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1 A. That was the meeting. You were on the phone.

2 Q. Yes.

3 A. Okay.

4 Q. That was the meeting. That's the only meeting
5 you recall ever having with Ron Lisan. You even
6 said that before?

7 A. Okay. So that is why this is in here.

8 Q. Okay. But that was not, during that discussion,
9 is it your testimony -- change that.

10 During that meeting, isn't it a fact that you
11 did not ever ask him about the details in the
12 reports of contact of Elaine Costanzo or Jessica
13 Foster or Rhonda Verb; is that correct?

14 A. Let me see here: It is possible that he was not
15 asked about those individuals and I am wondering
16 if the reason was due to when their allegations
17 occurred in time, if they were so long ago it
18 would have been --

19 Q. I really wasn't going into the reasons. I just
20 wanted to know whether or not it's a fact that at
21 least during one meeting that you had with
22 Dr. Lisan, you never asked him anything about the
23 written ROC charges or even factually about the
24 details of any of those charges of those three
25 individuals, Foster, Costanzo or Verb. That's

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1 all I'm asking.

2 A. I don't have any recollection of asking him about
3 those things during the meeting that we had where
4 you were on the phone.

5 Q. Okay. Do you remember asking him about those
6 details with those three CRNAs at any time prior
7 to the authoring and final version that we're
8 holding here, Exhibit 6, of this fact finding
9 report?

10 A. I don't recall any recollection of any time of
11 asking him; and the time that I would have been
12 most likely to ask him would have been during the
13 meeting when you were on the phone.

14 Q. Thank you. Do you recall even asking him about
15 any of the details of the claims being made by
16 Karin Bonfili during that meeting that you just
17 mentioned when I was on the phone?

18 A. I don't have a recollection about the contents of
19 the meeting; however I see that I wrote he stated
20 that he did touch Karin Bonfili in the interview
21 section in this report.

22 Q. On the back?

23 A. Correct.

24 Q. All right. Now, you wrote, and if you will be
25 kind enough to turn to Page 5 of 6, and I'm going

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1 to refer to the "Conclusion" section.

2 A. Okay.

3 Q. Let's start with the second paragraph in the
4 conclusion. "While the complainants"?

5 A. Yes.

6 Q. You say "While the complainants."

7 Complainants in this sentence means the four
8 CRNAs, right?

9 A. Correct.

10 Q. "Have cited that Dr. Lisan has engaged in
11 sexually inappropriate jokes and commentary
12 throughout the course of their employment, there
13 is no indication that anyone informed him to stop
14 with the exception of Elaine Costanzo after which
15 he stopped."

16 Why did you put that in here if it didn't
17 matter?

18 A. Because when you're making a determination of
19 sexual harassment, if there are repeated
20 instances, and there's an example of someone
21 saying stop and they continue, that is where you
22 can find a sexual harassment decision.

23 That did not occur in this case.

24 Q. I understand.

25 You went on to write, and I'm just reading

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1 starting with the bottom of the page, if you'll
2 follow me, "In reviewing the totality of the
3 case."

4 That includes all four CRNAs, right?

5 A. Correct.

6 Q. "In reviewing the totality of the case," you
7 write here, "it fails to rise to the legal of
8 sexual harassment as defined in policy which was
9 promulgated pursuant to Equal Opportunity
10 Employment law."

11 Did you write that sentence?

12 A. Yes.

13 Q. Do you agree with it?

14 A. Yes.

15 Q. And could you summarize why none of the four
16 complaints rise to the level of sexual harassment
17 as defined in policy which was promulgated
18 pursuant to equal opportunity employment law?

19 A. Because there was no indication that what's
20 required to have a finding of sexual harassment
21 was met.

22 Q. Can you identify for me what was missing?

23 A. Repeated instances especially when a person asks
24 you to stop or a management official asks you to
25 stop which would meet the measure where a

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1 reasonable person would conclude a hostile work
2 environment has been created based on sexual
3 harassment.

4 Q. Now let's look at the very last two sentences on
5 Page 6 at the top. Are you with me?

6 A. Yes.

7 Q. It says, "However, it is clear sexually
8 inappropriate behavior was occurring.
9 Moreover" -- well, okay. Let me just stop with
10 that sentence. I'm sorry. Let me read it again.

11 "However, it is clear sexually inappropriate
12 behavior was occurring."

13 You wrote that as well?

14 A. Correct.

15 Q. Now, this is a fact finding document, isn't it?

16 A. Yes.

17 Q. To reach a conclusion that sexually inappropriate
18 behavior was occurring, a significant part of
19 that would have to be based on the assumption
20 that the facts related in the CRNAs' ROCs, report
21 of contacts, were true, right?

22 A. Yes. As well as the interviews.

23 Q. Yes. So you interviewed all four of the CRNAs,
24 correct?

25 A. Yes.

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1 Q. You read these different ROCs, report of
2 contacts, that they filled out?

3 A. Uh-huh.

4 Q. All right. And you concluded they were telling
5 the truth; is that correct?

6 A. Telling the truth?

7 Q. Yes. About what happened?

8 A. Yes.

9 Q. You didn't have any doubts about that, did you?

10 A. No.

11 Q. You never talked to Dr. Raphaely about any issues
12 she might have been having with Dr. Lisan?

13 A. Related to sexual harassment?

14 Q. No. Related to any complaints he made about her?

15 A. No.

16 Q. Did you ever ask her if she believed these
17 accusations?

18 A. Not to my recollection.

19 Q. But in believing all of these statements made by
20 these four CRNAs including the context of the
21 statements as described in writing, you never
22 discussed them detail by detail with my client,
23 Dr. Lisan, did you?

24 A. As I said, I had no recollection of what we
25 talked about in our meeting.

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1 Q. But you have a recollection of meeting with the
2 CRNAs, right?

3 A. Yes, because I was able to refresh my memory by
4 reading their ROC statements.

5 Q. Yes. I understand but you never, but you have no
6 recollection of ever talking directly to
7 Dr. Lisan about the actual detailed accusations
8 being made against him?

9 A. Correct. Right now I don't have a recollection
10 of that meeting.

11 MR. SINDELL: Would you read his
12 last answer, please? Just read it to me.

13 THE NOTARY: "Correct. Right --"

14 MR. SINDELL: Stop there.

15 BY MR. SINDELL:

16 Q. Don't you think that, in all fairness, Mr. Kafer,
17 that you should have asked Dr. Lisan what his
18 response was to the details that were being
19 alleged against him before concluding that he in
20 fact made inappropriate remarks?

21 A. It is possible that I asked him that during our
22 meeting.

23 Q. Okay. He says -- let me just ask you to assume.
24 I was listening to the meeting. Okay? Several
25 other people were listening to the meeting.

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1 Dr. Lisan was in the meeting and to the best of
2 my knowledge -- and I was listening very
3 carefully -- you never brought up at least three
4 of the CRNAs in any detail or read any part of
5 any accusation of any report of contact.

6 My question to you is: Are you disagreeing
7 with what I just said?

8 MS. JOHNSON: Objection. You are
9 testifying. You may answer.

10 Q. I mean we can call in all these people and have
11 them state their recollections in addition to
12 Ron, Dr. Lisan; but don't you think -- let me --
13 withdrawn.

14 Don't you think it was incumbent upon you,
15 whether you remember or don't remember, it was
16 incumbent upon you to present Dr. Lisan with the
17 specific details of what these CRNAs were saying
18 against him and give him an opportunity to
19 respond?

20 A. As I said, I may have said that during the
21 meeting because I see that he responded to one of
22 the questions and it was included in the report.
23 I also recall that you were not present for the
24 entire meeting via phone.

25 Q. Okay. Mr. Kafer, I'm going to have her read --

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1 we're about over here, so we can conclude this.
2 I'm going to have her read the question because I
3 don't, again, because I don't believe you
4 actually answered my question so I want you to
5 listen to it very carefully and see if you can
6 answer directly the question that I asked you.

7 A. Okay.

8 THE NOTARY: "Don't you think it
9 was incumbent upon you, whether you
10 remember or don't remember, it was
11 incumbent upon you to present Dr. Lisan
12 with the specific details of what these
13 CRNAs were saying against him and give him
14 an opportunity to respond?"

15 MS. JOHNSON: And what was his
16 answer, please? Could I hear his answer as
17 well please.

18 MR. SINDELL: Now he's going to
19 forget the question if she does that.

20 MS. JOHNSON: Well, because you
21 were saying he didn't answer the question,
22 I wanted to please hear his answer.

23 MR. SINDELL: Okay. Answer the
24 question. The question, let me just --
25 this is off the record, if I may.

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(Thereupon, a discussion was had off the
record.)

- - - -

MR. SINDELL: Okay. That's fine.
Read it back.

THE NOTARY: "Don't you think it
was incumbent upon you, whether you
remember or don't remember, it was
incumbent upon you to present Dr. Lisan
with the specific details of what these
CRNAs were saying against him and give him
an opportunity to respond?"

ANSWER: "As I said, I may have
said that during the meeting because I see
that he responded to one of the questions
and it was included in the report. I also
recall that you were not present for the
entire meeting via phone."

MR. SINDELL: That's not an answer
to the question.

MS. JOHNSON: I think you may
reask it.

**Q. Okay. Did you hear the question again okay? Can
you answer my question?**

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1 A. It was incumbent upon me to ask about the most
2 relevant details of what the complainants
3 alleged.

4 Q. When you say "the most relevant details," are you
5 saying it was incumbent of you to ask him about
6 the main accusations against him by each of the
7 CRNAs as reflected in the reports of contact that
8 each of them made?

9 A. No.

10 Q. Oh, no?

11 A. I'm saying the most relevant details, which would
12 be the most immediate things as I look at this
13 and reoriented this.

14 For instance, the things that were reported
15 as occurring like two years ago would be
16 irrelevant and a waste of time to ask Dr. Lisan
17 about.

18 However, the more recent events from the one
19 ROC, I think it was dated the 4th or the 7th or
20 the 17th, where she came forward and asked and
21 then there was another, and this follow-up one
22 from, on Exhibit 3, these are, these are the
23 types of things that would be relevant.

24 Q. Okay. Well, we're going to have to -- I'm going
25 to have to extend this thing, very briefly

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1 hopefully, when you say that because I want you
2 to point out to me, and you have them all right
3 there, so you can just pick them up and read
4 them. Let's take, you said Costanzo's is so
5 old -- withdrawn.

6 You made a statement that he made
7 inappropriate remarks. Okay?

8 A. Uh-huh.

9 Q. Is that a yes?

10 A. Yes.

11 Q. Did he make any inappropriate remarks to Elaine
12 Costanzo?

13 A. I need some direction. Which one is Elaine
14 Costanzo? What exhibit?

15 MS. SHIVELY: 24.

16 A. 24. I see that this is the one signed by Elaine
17 Costanzo.

18 Q. Yes.

19 A. Yes. For instance, this one by Elaine Costanzo I
20 would have not felt a need to cover the specific
21 details of what she alleged had occurred two
22 years ago.

23 Q. What was it?

24 A. She alleged two years ago that he made comments,
25 inappropriate comments of a sexual nature while

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1 caring for patients in the operating room.

2 **Q. So that isn't something, then, that you**
3 **considered as part of inappropriate remarks?**

4 A. I would consider it inappropriate remarks;
5 however, I would not, in the context of a sexual
6 harassment fact finding investigation where the
7 purpose is to determine were there facts that
8 rise to the level of sexual harassment --

9 **Q. But I'm not asking you that. I want to be clear.**
10 **This is not about sexual harassment. You wrote**
11 **in a sentence here: "It is clear sexually**
12 **inappropriate behavior was occurring." Okay?**

13 A. Right.

14 **Q. What sexually inappropriate behavior are you**
15 **referring to?**

16 A. Oh, okay. I would be referring to anything that
17 is characterized as sexually inappropriate from
18 these four complainants because it would
19 demonstrate a pattern of sexually inappropriate
20 behavior.

21 **Q. Well, give me some examples. What did you**
22 **consider sexually --**

23 A. Talking about your genitalia.

24 **Q. Okay.**

25 A. But the reason why I would not have covered the

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1 specific details of sexually inappropriate
2 behavior in the meeting is because the purpose of
3 the meeting had to do with sexual harassment
4 which is different than sexually inappropriate
5 behavior.

6 Q. Well, then if you weren't investigating -- well,
7 whether it's sexual harassment or sexually
8 inappropriate behavior, you still have to
9 determine if the behavior that was sexually
10 inappropriate actually occurred, don't you?

11 A. I can write what my impression is in the report
12 based on the facts I obtain.

13 Q. Okay. I guess, all right, last thing here. Let
14 me just bring this up.

15 Are you familiar with the sexual harassment
16 checklist?

17 A. Yes. It's contained in the policy.

18 Q. All right. I understand.

19 - - - -

20 (Thereupon, Plaintiff's Exhibit 26, 1/10/17
21 "Sexual Harassment Allegation Checklist", was
22 marked for purposes of identification.)

23 - - - -

24 Q. This is marked Plaintiff's Exhibit 26 and it does
25 come from Medical Center Policy 003-003.

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1 A. Excellent.

2 Q. Thank you for the compliment.

3 A. You've acquired relevant documents.

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. It says here, I was -- well, first of all, it
7 says at the top "Sexual Harassment Allegation
8 Checklist. (Alleged harasser.)"

9 There's also a list for the complainer, isn't
10 there?

11 A. There's also a what?

12 Q. A checklist for the complainer? The one
13 complaining about harassment?

14 A. Oh, the complainant.

15 Q. Complainant, the complainant?

16 A. Correct.

17 Q. All right. This is the alleged harasser?

18 A. Got you.

19 Q. Now, it says, "I have ordered the alleged
20 harasser to cease any contact with the alleged
21 victim except that which is absolutely required
22 for official business."

23 Did I read that correctly?

24 A. Yes.

25 Q. Is that what you think Ron Lisan violated? It

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1 says in your report here in the very last
2 sentence, "Lisan had violated the supervisory
3 order"?

4 A. To have no contact?

5 Q. I think that's what you're referring to. I'm
6 asking you that.

7 A. Yes.

8 Q. Is that what you're referring to?

9 A. Yes.

10 Q. Okay. So this is a contact for sexual harassment
11 allegations in a case where there was no conduct
12 that rose to the level of sexual harassment?

13 A. Okay.

14 Q. Is that correct?

15 A. Yes.

16 Q. Okay: Is it appropriate without any mediation
17 effort on the part of the supervisor to
18 immediately send something for EEOC complaints of
19 a sexual harassment nature and order the alleged
20 harasser not to have any contact other than
21 strictly business necessity with the complainant
22 for these kinds of allegations?

23 A. Yes.

24 Q. Okay. Would it be also appropriate for the
25 manager to order the complainant not to have any

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1 contact with the harasser other than strict
2 business necessity?

3 A. Did you say would it be appropriate for the --

4 Q. Well, is there a checklist that says the same
5 thing for the complainant, that the complainant
6 is ordered to cease contact with the alleged
7 harasser except that which is absolutely required
8 for official business?

9 A. I don't recall the checklist, if it says that or
10 not.

11 Q. Okay. If I told you it did, is that something
12 that should be presented to the complainant?

13 MS. JOHNSON: Objection. You may
14 answer.

15 A. Possibly.

16 Q. Oh, you mean it must be given to the harasser but
17 only possibly should be reported to the
18 complainant?

19 A. That is my recollection.

20 Q. Okay. So the complainant is free to talk about
21 it and discuss it with whomever including the
22 harasser but the harasser can't talk about it to
23 the complainant. Is that what you think?

24 A. I don't know about talking about or what that
25 means.

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1 Q. Talking about the harassment issue?

2 A. You mean is there like an imposed gag order on
3 them?

4 Q. Yes.

5 A. I don't know.

6 Q. Well, you don't know about the complainant but
7 you do know about the harasser?

8 A. You were asking me about contact and now you're
9 talking about talk about it.

10 Q. Okay. I'll make it so clear that there's no
11 question.

12 A. Okay.

13 Q. It says I have -- on the Exhibit 26, it says, "I
14 have ordered the alleged harasser to cease any
15 contact with the alleged victim except that which
16 is absolutely required for official business."

17 Okay? Did I read it right?

18 A. Yes.

19 Q. Now, there is also a sexual harassment checklist
20 for the alleged complainant, correct?

21 A. I believe so but I do not recall the specifics of
22 that checklist. Do you have it?

23 Q. I have it. I can't find it at the moment but I
24 do, but I do have it.

25 A. Okay.

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1 Q. I actually do and I believe I know what's on it,
2 too.

3 My question to you is: Isn't it, if you
4 know, a fact that the exact same order is on the
5 complainant's checklist that the complainant
6 should cease to have any contact with the alleged
7 harasser except that which is absolutely required
8 for official business? Do you know one way or
9 the other?

10 A. Right now, I do not recall if that is on there.

11 Q. And if it is, then that should be presented to
12 the alleged complainant, shouldn't it?

13 A. I would say possibly.

14 Q. Under what circumstance, if it's on the alleged
15 complainant's form checklist, should it only
16 possibly be presented to the alleged complainant
17 and not, and possibly to the harasser?

18 A. Because this checklist is completed typically by
19 the manager. In some cases an EEO fact finding
20 team would perform some of these functions
21 therefore not all of these would be checked off
22 by the manager.

23 Q. If the alleged complainant made contact with the
24 alleged harasser contrary to an order on a
25 checklist given by the manager, would that be a

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1 violation as well of an order from the VA?

2 A. If it was about official business, it would not
3 be a violation.

4 Q. No, not official business.

5 About the contents and issues of the
6 harassment. Wouldn't that be a violation too?

7 A. If the checklist says the same thing that this
8 checklist says and the complainant violated an
9 order, then that would be regarded as a violation
10 of an order.

11 Q. Would it be a problem if only the harasser was
12 allegedly punished for the violation but not the
13 complainant punished for the violation?

14 A. I would have no knowledge about the issuance of
15 discipline related to violations of orders
16 because I do not, I am not involved in
17 discipline.

18 MR. SINDELL: Okay. Very good.

19 Let's take a quick break.

20 - - - -

21 (Thereupon, a recess was had.)

22 - - - -

23 MS. JOHNSON: So after the
24 deposition is transcribed by Pam, you have
25 the opportunity to read it and correct any

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errors or you can waive that right.

I would recommend reading the
transcript in this case so you need to tell
Pam what your decision will be about that.

THE WITNESS: Okay.

- - - -

(Deposition concluded.)

- - - -

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SIGNATURE PAGE

I, BRUCE KAFER, RN, MSN, having
read the foregoing deposition, do hereby certify
said testimony is a true and accurate transcript;

_____ I submit no changes.

_____ I submit the following changes on
the _____ errata sheet(s) attached hereto
and made a part hereof.

BRUCE KAFER, RN, MSN

DATE SIGNED

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C E R T I F I C A T E

The State of Ohio,) SS:
County of Cuyahoga.)

I, Pamela S. Greenfield, a Notary Public within and for the State of Ohio, authorized to administer oaths and to take and certify depositions, do hereby certify that the above-named witness was by me, before the giving of their deposition, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition as above-set forth was reduced to writing by me by means of stenotypy, and was later transcribed into typewriting under my direction; that this is a true record of the testimony given by the witness; that the deponent or a party requested that the deposition be reviewed by the deponent; that said deposition was taken at the aforementioned time, date and place, pursuant to notice or stipulations of counsel; that I am not a relative or employee or attorney of any of the parties, or a relative or employee of such attorney or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this 18th of March, 2019.



Pamela S. Greenfield, CRR, RDR
Notary Public, State of Ohio
My commission expires July 2, 2023

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1 DO NOT WRITE IN TRANSCRIPT EXCEPT TO SIGN.
2 Please note any word changes/corrections on this
sheet only. Thank you.

3 Page/Line Correction

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<p style="text-align: center;">Exhibits</p> <p>Kafer Exhibits_6_ thru_26</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>000.003 175:15 003-003 171:23 209:25 003.003 171:20 175:14,16 0857e 139:9</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 31:16,25 32:18,20, 21,24 33:4,6 39:20 41:20,25 168:20 1's 41:25 1/10/17 209:20 1/11/17 144:1 1/12/17 149:1 150:4, 5 1/13/17 156:1 1/18/17 163:23 1/employee 168:20 10 24:7 66:19,24 67:1,14 105:9 127:4, 18,23,24 128:3 147:21 100 14:3 10:00 144:24 151:12 10:50 67:17 127:5 10:55 144:19 146:22 11 95:9,11 97:6 146:22 147:21 11/27/13 95:11 104:2,20 11th 144:19 151:4,8 152:21 12 103:25 104:2,8,10 149:7 12/16/16 61:1 12/19/16 66:19 126:1 12/20/16 130:17 12/23/16 138:3 12/27/16 138:19 12/8/16 54:8 12th 149:22 150:17, 24 151:8,9 13 104:20 105:1,2,3 128:17 15 130:17,22 131:3 135:23 16 62:11 138:3,8 17 138:19,23 142:18, 19 160:5 17th 206:20 18 144:1,5,7 164:17</p>	<p>18th 151:1 218:18 19 10:6 67:16,17 120:23 127:16 148:24 149:1 1962 10:3 1980 10:24 1999 11:23 12:5 19th 111:3 113:19 126:9 157:4 1:28 85:2 1:50 126:10 127:6,15</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 31:18,19,25 32:1, 19,20 33:1,5 39:12,18 41:20,21,22,23,24 42:2,4 43:6 157:13 168:20,22 180:8 191:2,3 218:22 20 24:16,17 150:2,4 2009 12:14 2010 14:2,4,12 2016 53:23 54:20 55:8 62:11 67:17 98:19 102:16 107:20 111:3 120:23 127:16 138:10 139:14 2017 37:13,16,17 98:19 102:17 144:19 146:22 148:9 149:7, 22 150:24 157:4 164:17 192:6 2019 85:2 218:18 2023 218:22 20th 24:4 131:5 137:22 21 104:12 155:24 156:1 22 156:16,18 23 163:23 164:5,12 23rd 138:10 142:22, 24 147:17,21 24 56:9,21,23 182:16, 18,22 187:3 207:15, 16 25 187:8,10,14 26 209:20,24 213:13 27th 139:14 143:3 2nd 10:3</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 160:5 161:3,23 162:2,3,9 163:16 180:1 192:1,4 206:22 30 24:17 35275 9:6 38 10:6</p>	<p style="text-align: center;">4</p> <hr/> <p>4 192:1 44039 9:7 47 10:7 4:21 131:12 4th 206:19</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 197:25 57 10:9 5975.1 95:12 104:3, 21</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 34:23 35:3,23 41:15 168:10 171:24 180:2, 3,7 194:19 197:8,25 200:5 66 14:7,17 6:44 150:18,19</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 35:13,18 7th 55:8 206:19</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 54:8,13,14,19,20 85:2 8th 192:5</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 61:1,5,6,7,9 62:12 9:23 157:5</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>a.m. 67:17 144:19,24 146:22 151:12 157:5 ability 140:10 148:17 172:19 above-named 218:8 above-set 218:10 absence 107:12,20 128:24 163:21 absent 68:15 194:17 absolutely 137:11 210:21 212:7 213:16 214:7 accept 180:21 accepted 64:5 access 26:4 172:16, 19 accommodation 12:22 13:13,19,21,24 14:5,11,18 15:18 18:14,15 27:7,16 28:7,20 29:1,12,15</p>	<p>53:2 54:1 59:7,10,11, 24 60:3,4,9,16,18,23 61:14 62:18 63:2,8,11 64:4,11 65:6,19 66:8, 14 68:8 69:23,24 70:7,17 71:13,18 72:8 73:5,19 74:3,22 75:1 76:14 79:5 81:11,15, 18,24 82:3 87:16 98:2 103:23 104:4,13 109:22 110:3,14,15 111:6,8,17 112:9 113:11,24 126:2 129:24 130:18 135:1, 7 136:4,5 145:3 147:1 148:14 149:22 150:6, 20 152:16 153:9 156:3 158:5 161:6,13 166:3,6 167:9 168:14 accommodations 53:6 55:22 57:8,13, 15,22 58:17,25 66:20 68:18,23 112:20,23 113:2,13 114:2 accomplished 69:25 account 103:10 185:19 accurate 145:10 152:20 217:8 accusation 119:6 203:5 accusations 201:17 202:7 206:6 acquire 133:3 acquired 189:1 210:3 action 179:3 192:23 218:16 activities 13:14 14:19,23 86:13 actual 13:2 146:7 175:15 202:7 add 45:9 106:20,24 154:13,15,18 added 107:11,14,24 adding 112:3 addition 6:12 203:11 additional 42:20 125:19 address 9:5 addressing 172:2 adjourn 123:23 administer 218:7 administrative 61:20 62:1,2,16 193:4 advances 185:15 advertising 95:25 advise 130:6 137:23 affect 183:21 affirmative 36:6,9, 21 38:23</p>	<p>aforementioned 218:13 afternoon 85:1 127:6 age 6:1 21:3 agency 176:15 agents 179:2 agree 15:21 16:25 26:17,22 27:23 28:17 30:24 31:5,12 73:17, 22 98:8 99:19 120:1 124:20 125:12 132:15 149:24 155:7 175:3, 22 176:7 199:13 agreement 96:17 ahead 16:6 21:22 55:4 61:25 79:7 100:13 150:9 191:6 alignment 89:4 93:10 allegation 33:2 40:13,18,22 47:17 49:1 172:2,4 175:12 187:4 193:14 209:21 210:7 allegations 19:17 20:4,5 36:3 44:14 193:13 194:11 196:16 211:11,22 alleged 17:20 39:20 171:15 185:8 194:2 202:19 206:3 207:21, 24 210:8,17,19,20 211:19 212:6 213:14, 15,20 214:6,12,14,16, 23,24 allegedly 39:13 170:14,23 171:16 215:12 alleging 180:9 allowed 76:4 100:2 119:20,21 alternate 114:2 alternative 112:19, 23 113:2,13 124:18 Altose 52:12 55:15, 16,17,21 57:12,14,21 58:17,22,24 64:7,9, 15,17 65:1,11 177:16 ambulatory 108:13, 19 110:23 166:11 amount 96:4,7,9 Andrea 36:13,16 38:25 39:2 anesthesia 42:12 43:17 45:5 69:7 125:10 128:4 149:14 anesthesiologist 78:23 80:14 86:2 88:16 89:12 90:2 92:19 93:19 94:16,24 95:4,6 98:11,22 99:2</p>
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